QUARTERLY REPORT
of the
ATTORNEY GENERAL
of
ALABAMA

For the Period:
From April 1, 1941
Through June 30, 1941
Volume XXIII

TO ALL STATE AND COUNTY OFFICERS OF ALABAMA:

In accordance with Code 1940, Title 55 Section 228, I am submitting to you the Quarterly Report of the Opinions of the Attorney General of Alabama. This Report covers all opinions rendered by the Attorney General from April 1, 1941 through June 30, 1941.

The Section of the Code referred to above requires that seven copies of this Quarterly Report be sent to each of the Probate Judges in the State and the Probate Judge shall in turn deliver one volume each to the Clerk of the Circuit Court, the Sheriff, the Tax Collector, the Tax Assessor, the County Superintendent of Education, and Deputy or County Solicitor. Said Code Section also provides a copy of said Report be sent each Circuit Solicitor and the chief executive officer of each incorporated municipality in this State.

The office of the Attorney General is anxious to render prompt and efficient service to the State and county officials. If you have any suggestions to make regarding the improvement of the service, we should be glad to receive it. We welcome your criticism.

Very respectfully,
THOMAS S. LAWSON,
Attorney General.

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OPINIONS

April 1, 1941.

Hon. Chris J. Sherlock, Director,
State Highway Department,
Montgomery, Alabama.

Officers — Judges of Probate — Highways — Counties —

A judge of probate is not prohibited from selling goods or supplies to the State Highway Department for use in the construction or improvement of a State highway or highways in the County of which he is Judge of Probate, the work of construction or improvement to be done by the State Highway Department, even though the county and the state bear the costs of the project, jointly.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your letter of March 17, 1941, in which you request an official opinion, is as follows:

Re: Gravel Pit

"The State Highway Department selected a certain gravel pit on private property on which to build the base for a pavement in Talladega County, but for the purpose of arranging for the purchase of this material, the Probate Judge of Talladega County contacted the owner and got the option on this gravel. The Probate Judge intends to process this gravel, manufacturing concrete aggregate to be used in the construction of the proposed power plant to be erected in the vicinity of Childersburg, Alabama. The Probate Judge readily agrees to sell as much gravel as needed for the construction of the State road, at a price that is satisfactory to this department.

"This question has arisen—since the State and County are building this project on a fifty-fifty cost basis, with all construction work to be done by this Department, the County being interested only financially, can the Probate Judge, holding an option on this particular gravel pit, and being a duly constituted official of the County, sell this material on a project in which the County is interested, even though the County is interested only in 50% of the cost of the project. The option which the Probate Judge holds is taken in his capacity as a private individual. Therefore, please advise this Department whether the Judge of Probate can legally sell this material for this project, in view of the above stated facts. A prompt reply to this request will be appreciated, inasmuch as construction is awaiting the securing of this material as it appears to be the only available material in that vicinity."

From your letter of inquiry, and the copy of the contract furnished me which was entered into by the State of Alabama and Talladega County, I gather that the State of Alabama and Talladega County have contracted

for the construction or improvement of certain State highways in Talladega County, the work of construction or improvement to be done by the State Highway Department, with the cost to be born, roughly speaking, equally by the State of Alabama and Talladega County. Further, it appears that the county's contribution as to some of the work may be made in cash, and/or equipment, rentals and/or supplies, and that the county's contribution as to the other part or parts of the work is to be made in cash. It also appears that the Judge of Probate of Talladega County has an option on certain gravel, located in the county, which the State Highway Department has selected for use in this construction or improvement work, and that the State Highway Department is desirous of purchasing this gravel from the Judge of Probate, if it may legally do so. It also appears that the Judge of Probate is willing to sell to the State Highway Department as much gravel as is needed in the construction or improvement of this State highway or these State highways at a price satisfactory to the State Highway Department, even though he had secured the option on this gravel for an entirely different purpose.

If the Judge of Probate may not legally sell this gravel to the State Highway Department for use in this construction or improvement work on this State highway or these State highways in Talladega County, it is because of the provisions of Section 5024 of the Code of Alabama, 1923, as amended by Act 193, H. 300, approved March 2, 1937, General Acts, 1936-37, p. 225, which reads as follows:

"5024. COUNTY OFFICERS INTERESTED IN COUNTY CONTRACTS, OR HIRE OF COUNTY CONVICTS — Any judge of probate, tax collector, tax assessor, sheriff, clerk of the circuit court, solicitor, or county treasurer, members of the court of county commissioners or board of revenue, or any other state or county officer who takes any contract, for work or services of the county, or is employed in any way under such contract, or is interested in any contract for hire of county convicts, **or sells any goods or supplies to the county,** or is in any wise pecuniarily interested in any such contract or sale, as principal or agent, must, on conviction, be fined not less than fifty nor more than one thousand dollars, and may be imprisoned in the county jail, or sentenced to hard labor for the County for not exceeding twelve months; but nothing in this section shall apply to the sale or purchase of drugs or medicine for the use of prisoners or paupers; but this section shall not be construed to prevent the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County from employing as attorney to such governing body an attorney who holds an office which does not preclude him from practicing law and does not require his full time and for which, as such officer, he is compensated on a per diem or fee basis, nor shall it be construed to prevent the Treasurer in lieu of a County depository from being employed as clerk to the Court of County Commissioners, Board of Revenue, County Commission or other governing body of the County." (Emphasis supplied)

In my opinion, this section, as amended, supra, does not prohibit the Judge of Probate from selling this gravel to the State Highway Department.

JAMES F. MATTHEWS

Section 5076 of the Code of Alabama, 1923, is a statute similar to the statute hereinabove set out. It reads as follows:

"5076. LETTING CONTRACTS TO RELATIVES OR EMPLOYING RELATIVES OF COMMISSIONERS; PENALTY FOR. — Any member of any commissioners' court or board of revenue who shall award any contract in which the county of such commissioner or member of board of revenue is interested to any person related, either by blood or marriage within the fourth degree to such commissioner or member of board of revenue, or who shall employ any such relative to do any work for said county, or to act as agent for any such member in any work in which such county is interested, shall be guilty of misdemeanor and, on conviction, shall be fined not less than ten dollars nor more than one hundred dollars."

In the case of Garrison v. Sumners, 223 Ala. 17, 130 So. 675, the Supreme Court was queried by the Court of Appeals as to whether or not said section applied to the Court of County Commissioners or Boards of Revenue or to the individuals composing said boards. The Supreme Court replied to this query as follows:

"The statute in question belongs to the criminal law. It is a fundamental rule of construction that penal statutes must be strictly construed, but should not be subjected to strained or unnatural construction in order to work exemption from their penalties. 36 Cyc. 1184. On the other hand, such statutes are not to be extended by construction. Gunter v. Leckey, 30 Ala. 591. In Huffman v. State, 29 Ala. 44, quoted in Walton v. State, 62 Ala. 199, this court said: 'While we disclaim the right to extend a criminal statute to cases out of its letter, yet we hold it to be our duty to apply it to every case clearly within the cause or mischief of making it, when its words are broad enough to embrace such case.'

"Applying as well as we may the foregoing rules of construction to the act in question, the court here is of opinion that the criminal penalty provided by the statute applies to the individual members of the court of county commissioners — meaning that the individuals composing the courts of county commissioners (or the boards of revenue in counties having such boards) are prohibited under criminal penalty to let contracts to persons related to them within the degree denounced by the statute or to sit as members of the court when considering or voting upon any county contract with any person so related to the individual member.

"True enough, the statute may be construed as denouncing certain acts as unlawful without reference to the criminal penalty involved. But, so construed, the provision is that it shall be unlawful for any member to award any contract, etc., to any person related to such member, or to employ any such relative, etc. **If it was the legislative purpose to denounce all contracts made with any person related to any member of the commissioners' court and thus, in effect, to deny to any person related to any one member of the court, a mere administrative body, the right to make any contract with the county, that purpose has not been adequately expressed, is left to inference, which inference should**

not be drawn, in view of the clearly expressed purpose to denounce contracts with persons related to the member who awards them." (Emphasis supplied)

Applying the logic and reasoning of that opinion to the instant situation, it follows: Section 5024, as amended, supra, belongs to the criminal law. It must be strictly construed and may not be extended by construction. To hold that said section, as amended, supra, prohibits the Judge of Probate from selling gravel to the State Highway Department, for use in the construction or improvement of a State highway or State highways in the county of which he is Judge of Probate, because of the fact that the county is contributing to the cost of the construction or improvement of said State highway or State highways by the State Highway Department, would be to liberally construe said section, as amended, supra, and to extend the same by construction. For this section to prohibit such a sale, its prohibition against a Judge of Probate selling any goods or supplies "to the county" would have to be extended to read "to the county, or to the State of Alabama, if the goods or supplies sold to the State of Alabama are to be used by the State of Alabama in a project, to the cost of which the county contributes." If it was the legislative purpose to prohibit such a sale, that purpose has not been adequately expressed, is left to inference, which inference should not be drawn, in view of the clearly expressed purpose to prohibit such a sale "to the county" only.

The Court of Appeals in the case of **Garrett vs. State,** 28 Ala. App. 78, 178 So. 825, did hold that the sale of goods or supplies by a member of the county governing body of Cherokee County to the custodian of the almshouse of said county to be used for feeding the inmates thereof was in violation of section 5024, as amended, supra. However, the almshouse was an institution of the County, the bill for the goods and supplies sold by the member of the county governing body to the custodian of the almshouse for use in feeding the inmates thereof was filed with the county governing body of which he was a member, and whose duty it was to audit the same and order it paid from the county treasury. So, it clearly appears that the transaction before the Court in that case is distinguishable, and different in character, from the one here under consideration.

The premises considered, it is my opinion that the State Highway Department may legally purchase the gravel in question from the Judge of Probate of Talladega County, even though the gravel so purchased by the State Highway Department is to be used in the construction or improvement of a State Highway or State highways in Talladega County, to the cost of which Talladega County contributes.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 1, 1941.

Hon. F. L. Gaddis,
Judge of Probate,
Autauga County,
Prattville, Alabama.

Revenue Act 1935, Section 348, Schedule 46—Deed—Filing Tax— (1) Deed filing tax not payable on quitclaim deed from state to grantee if quitclaim was executed for a nominal consideration for the purpose of perfecting title to the property therein described.

(2) Such deed otherwise subject to said tax upon basis of value as stated in Schedule 46 of Section 348, Revenue Act, 1935, (Gen. Acts, 1935, pages 256, 456).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of February 22, 1941, in which you request my official opinion as follows:

"Will you please send us a list of tax to be collected on a quit-claim deed from the State to an individual? We have had some question as to whether an instrument of this kind carries a deed tax or not. We are of the opinion that law passed in July, 1940, would make it possible for a deed tax to be collected on amount of purchase. This deed in question is not a tax sale deed but deed made to individual from the State for right-of-way."

From the above statement, it is not entirely clear (1) whether the quitclaim in question was executed "for a nominal consideration for the purpose of perfecting the title to real estate," or (2) whether a substantial consideration was paid to the State by the grantee.

In the absence of the deed itself or a copy thereof for examination, the foregoing request for an official opinion can only be answered hypothetically, or by assumption of certain undisclosed facts.

If the deed was executed as first above stated, it comes within the exception in Schedule 46 of Section 348 of the Revenue Act of 1935 (General Acts, 1935, pages 256, 456) and is not subject to the so-called deed filing tax.

If on the other hand a substantial, as distinguished from a nominal, consideration was paid to the State by the grantee upon execution of the deed, the result must be otherwise, and the deed is subject to said tax, to be calculated on the basis of the value of the property or interest thereby conveyed, as set forth in said Schedule 46, supra.

If the value is not correctly stated as a consideration in the deed itself, then it is the duty of the Judge of Probate to investigate and ascertain the value of such property or interest and apply the schedule accordingly as held in the former opinions of this office. See opinion of this office of February 27, 1939, to Hon. John T. Frazer, Judge of Probate, Lee County, (Quarterly Report of Attorney General, Volume XIV, page 139).

In that opinion will be found an exhaustive discussion of the question now raised, and statement of the principles to be applied in calculating the amount of tax.

I am unable to find that Schedule 46, supra, has been repealed or amended by any subsequent legislation in July, 1940, or otherwise. It must therefore be taken and considered as the measure of duty of the Judge of Probate in the premises.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 2, 1941.

Hon. W. C. Coleman, Chairman,
Board of Commissioners,
Anniston, Alabama.

Voting Machines — Elections — Municipalities — Counties —

1. Where voting machines are adopted by the voters of a municipal corporation, such machines must be used in all elections held within such municipality, state, county, municipal, general, primary, and special.

2. Governing bodies of counties in which are located municipal corporations which have adopted voting machines, must furnish such machines for county and state elections.

3. Where voting machines have been adopted by municipal corporations, but due to constitutional or other debt limitations, such municipalities have not installed voting machines for use in municipal elections, this fact does not relieve the county in which such municipalities are located of the duty of providing voting machines for use in all other elections in said municipalities.

4. Where voting machines have been adopted by a municipal corporation, but due to constitutional or other debt limitations, such muncipalities have not installed voting machines for each election district in such municipality, but have installed voting machines in some election districts, then such municipalities must furnish one

voting machine for each six hundred registered voters in each election district in which voting machines have been installed.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of February 28, 1941, in which you request my official opinion as follows:

"I would like to have your opinion as to the construction of certain phases of the voting machine statute passed by the 1939 Legislature with reference to the following questions:

"1. Where a municipality by election has adopted the use of voting machines, but the county in which the municipality is located has not adopted the use of voting machines for the county, shall such machines be used in the municipality for state and county elections, as well as for municipal elections, or shall the machines be used only for municipal elections?

"2. If such machines must be used in the municipality for county and state elections then can the municipality legally require the county to pay part of the cost of the machines?

"3. If the municipality cannot require the county to pay part of the costs of the machines then can the municipality legally require the county to pay rent to it for the use of the machines in county and state elections?

"4. Where voting machines have been adopted by a municipality and said municipality does not provide voting machines for municipal elections held in said municipality by reason of a constitutional or other debt limitation, is it incumbent upon the governing authorities of the county in which said municipality is located to provide voting machines for county and state elections which may be held in said municipality?

"5. If the municipality is not able to purchase voting machines by reason of constitutional or other debt limitations for each election district, then what is the minimum number of machines which must be provided for municipal elections to be held in said municipality?"

Your several inquiries involve a construction of Act No. 292, S. 332, approved August 25, 1939 (General Acts, 1939, p. 443), generally referred to as the Voting Machine Act.

This office in an opinion rendered to Hon. S. P. Poyner, Judge of Probate, Houston County, which opinion appears on page 254 of Vol. XXI, Quarterly Report of Attorney General, held that where the majority of the voters of an entire county have expressed their desire for voting machines to be used in elections in that county, that such machines are to be used in every election provided for by the election laws of the State of Alabama, including

general, primary, special and municipal elections. It is my opinion that the converse of this holding is likewise true.

You are therefore advised that where the majority of the voters of a municipal corporation have expressed their desire for voting machines to be used in elections held within such municipal corporation, such machines are to be used in all elections held within such municipality, including general, primary, special and municipal elections.

Specifically answering your inquiry, it is my opinion that voting machines must be used in such municipality in county and state elections as well as in municipal elections.

In answer to your second inquiry, you are advised that I know of no authority of law which would authorize a municipality to legally require the governing body of a county to bear part of the cost of voting machines to be purchased by a municipality. However, if the county desires to enter into a joint undertaking with the city for the purchase of voting machines, to be used by the municipality in municipal elections and by the county in other elections held in the municipality, on terms mutually agreeable to the county and the municipality, it is my opinion that the county may legally do so. Cf. Opinion to Hon. J. H. Sims, Judge of Probate, Bullock County, Union Springs, Alabama, under date of March 1, 1941, a copy of which is enclosed.

In answer to your third question, your attention is again called to the Poyner opinion, wherein it was held, in view of the fact that the municipality there considered must use voting machines in municipal elections, it was likewise charged with the duty of furnishing such machines for municipal elections. It was further held in the Poyner opinion that a municipal corporation was authorized to expend its funds either for the renting or purchase of voting machines to be used in municipal elections. Following the same line of reasoning, it is my judgment that it is incumbent upon the county governing body to furnish voting machines for county and state elections held within such municipality, and, if the county governing body desires to use the municipal voting machines in such elections, it is my opinion that the municipality may legally require the county to pay rent for the use of its machines.

My answer to your fourth inquiry is in the affirmative.

As held hereinabove, where the majority of the voters of a municipal corporation have expressed their desire for voting machines to be used at elections held in such municipal corporation, such machines are to be used in all elections held within such municipality, including general, primary, special and municipal elections. Of course, this must be read in connection with the provisions of Subsection (e) of Section 4 of said Act, which reads as folllows:

> "Wherever, by reason of any constitutional or other legal debt limitation, it shall be impossible for any county or municipality to provide voting machines by either rental, lease or purchase for each election district, as provided herein, then it shall provide as many machines

as it shall be possible to procure, and, as soon thereafter as possible, shall provide the remainder of such machines required hereunder. The machines so provided shall be first installed in wards or precincts or beats having the largest number of registered voters."

If, by reason of any constitutional or other legal debt limitation, a municipality, the majority of whose voters have expressed their desire for voting machines to be used in all elections held therein, is unable to provide voting machines to be used in municipal elections held therein, in my opinion, this fact does not relieve the county in which the municipality is located from the necessity of providing voting machines for use in all other elections held in such municipality, unless, of course, the county is likewise prevented from providing such machines by reason of constitutional or other legal debt limitations. Since the effect of an election in a municipality at which a majority of the voters expressed their desire for the use of voting machines is to require their use in all elections held therein, I do not see how the failure or inability of the municipality to provide machines to be used in municipal elections held therein could affect the duty of the county in which the municipality is located to provide voting machines to be used in all other elections held therein.

In answering your fifth inquiry, attention is called to Subsection (b) of Section 4 of Act No. 292, supra, which Subsection reads as follows:

"In each voting place in which voting machines are used, the county board or city commission shall provide by rental, lease or purchase, at least one voting machine for each six hundred registered voters or faction thereof, therein,"

and also to Subsection (e) of said Section 4, supra. It will be noted from Subsection (b) that at least one voting machine must be provided for each six hundred voters or fraction thereof; and under the provisions of Subsection (e), supra, if the municipality is unable to furnish voting machines for each election district therein, it shall provide as many machines as it shall be possible to procure, the machines so provided to be first installed in the wards or precincts having the largest number of registered voters.

Of course, the number of voting machines which it is possible for a municipality to procure is a question of fact which addresses itself to the governing body of that municipality.

Reading these two sections together, it is my opinion, that, if a municipality is not able to furnish voting machines in each of the election districts therein, by reason of constitutional or other legal debt limitations, then it should furnish voting machines for use in as many of the election districts therein as possible, with at least one voting machine being furnished for each six hundred voters or fraction thereof in the election district or districts for which voting machines are provided, with said machines being installed in the largest wards or precincts first.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 2, 1941.

Hon. J. C. Grady,
Judge of Probate,
Chambers County,
LaFayette, Alabama.

Filing Tax — Deed Tax —

Instrument conveying or purporting to convey interest in real and personal property held subject to deed tax.

2. Filing Tax — Executors — Mortgage Assignment —

Instrument assigning mortgages upon which mortgage tax has been paid, held not subject to filing tax.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of February 12, 1941, in which you request my official opinion as follows:

"I am enclosing copies of two papers that have been filed in this office for record. Please examine them and let me know what filing tax, if any, I should collect on them.

"At the time the Willingham-Tucker paper was filed I endeavored to get Mr. Tucker to give me some idea as to the value of interest conveyed, which he refused to do.

"Thanking you for an early reply."

In reply I wish to refer you to the provisions of Schedule 46 of Section 348 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256, 456) which provides in part as follows:

"Schedule 46. Deeds, bills of sales, etc. No deed, bill of sale or other instrument of like character which conveys any real or personal property within this state, or which conveys any interest in any such property, except the transfer of mortgages on real or personal property within this State upon which the mortgage tax has been paid, deeds or instruments executed for a nominal consideration for the purpose of perfecting the title to real estate, and deeds and other instruments or conveyances, executed prior to October 1, 1923, shall not be received for record unless the following privilege or license tax shall have been paid upon such instrument before the same is offered for record to-wit: Upon all such instruments which are executed to convey real or personal property situated in this State of the value * * * *."

Reference is made to the document referred to in your request as the "Willingham-Tucker paper," paragraph 2 of which provides as follows:

> "2. The said Annie S. Willingham, for the consideration hereinafter set forth, does hereby assign, transfer, sell, set over and convey unto the parties of the second part, without recourse on her, all of the notes and bills receivable payable to or owner by Tucker, Willingham & Company, together with all mortgages, and her interest in the property or properties therein described, securing any such notes or bills, and all accounts owing to said Tucker, Willingham & Co., also, all cash and deposits in any bank now owned by or standing in the name of Tucker, Willingham & Company; also, all stocks of goods, wares, and merchandise, all furniture and fixtures, implements, tools and equipment, including motor vehicles, now owned by Tucker, Willingham & Company; and together with all of her right, title, interest and claim in and to all real estate, including lands and improvements thereon, now owned by Tucker, Willingham & Company; and she does, hereby agree that she will promptly execute and deliver her formal conveyances, duly executed, conveying to the parties of the second part, with description satisfactory to them, all such right, title and interest in real estate.
>
> "And she does hereby assert that it is the intention hereof that her entire interest, in and to all the assets of the said partnership, of whatever kind and wheresoever situate, shall pass hereby to the parties of the second part, but without any recourse on her or any guaranty or warranty by her, this grant to include Allen Warehouse and its business."

You will note that the intention of the parties is, as herein expressed, "to assign, transfer, sell, set over and convey unto the parties of the second part" considerable property, both real and personal. No value is set out in the document for the property named and until this is ascertained, the correct amount of deed tax here due cannot be determined. The amount of the deed tax due and payable must necessarily be the value of the property conveyed. (Quarterly Reports of the Attorney General, Vol. 7, page 243). The amount of the filing tax must be determine by the Probate Judge. **Long, Judge, v. a Jasper land company,** 217 Ala. 593, 117 So. 210, 211; **Thompson, Probate Judge, v. Smith,** 27 Ala. App. 460, 174 So. 796, 797. Since no definite amount of consideration is recited for the transfer here made, in my opinion it is the duty of the Probate Judge to refuse to record the instrument until this information is given to him. See **Thompson, Probate Judge, v. Smith,** supra.

Referring to the second document enclosed with your request which, in short, is an assignment of the mortgages named therein by the executors under the will of George W. Slaughter to the widow and, I assume, the beneficiary under said will, I note that each of the mortgages named in the document enclosed with your request purport to have been recorded in the office of the Judge of Probate of Chambers County. I, therefore, assume that proper taxes have been paid in each instance.

I call your attention to the first sentence of Schedule 46 quoted supra wherein the specific exception from the tax levied therein is given to the transfer of mortgages on real or personal property within this State upon

which the mortgage tax has been paid. In my judgment, the Legislature intended to except from the operation of Schedule 46 quoted supra, all assignments of mortgages upon which the mortgage tax levied by said Schedule 46 had been paid. Opinion of Attorney General (Biennial Report of Attorney General, 1936-38, page 729).

Premises considered, it is my opinion that no filing tax is due upon the instrument attached to your request assigning the mortgages named therein to Mrs. Diamond Grimmett Slaughter.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 2, 1941.

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

License Tax on Pool Rooms —

1. On voluntary surrender of license to Probate Judge, the Judge may issue new license to another to continue the business.

2. He must give credit on the amount of the license issued to the last man for the unused portion of the surrendered license.

3. The surrender of license and issuance of new license may be made at any time during the tax year for which surrendered license was issued.

4. In issuing new license, the same procedure must be followed as is required in the issuance of the original license.

5. Probate Judge receives same charges and fees as in the issuance of the original license.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of March 8, 1941, is as follows:

"Mr. Robert C. McAnnally has made application to this office for a license to operate a Billard Room in the City of Hanceville, Alabama,

and I am enclosing the papers which were presented to this office. I would appreciate your answering the following questions, to-wit:

"1. Under Section 4228 of the 1923 Code does this office have authority to issue a Billard Room license for the remaining part of the 1940-41 license year without any charges except the issuance fee.

"2. Should the surrendered license be accepted as part payment and a new license issued with the full amount of the license charged to the Applicant.

"3. Have we followed the proper procedure in surrendering the license and accepting the bond which is enclosed for your inspection.

"Encs: (1) License issued to Pastime Billard Parlor.

(2) Bond of Robert C. McAnnally."

The following questions involve a consideration and construction of Sections 4255-4258 of the Code of Alabama, 1923, and also a number of sections of an act of the Legislature to provide for the general revenue of the State of Alabama, enacted by the General Assembly in 1935 (General Acts, 1935, pages 256, et seq.). The license tax levied upon the business of operating a pool room is to be found in Section 348, Schedule 111, of this Act, on page 486 thereof. Section 350 of the Act, found on page 557, requires the applicant to pay to the Judge of Probate the amount required for the license and a fee of 50c to the Probate Judge for issuing the same. Section 368 of the Act provides that if the license should commence after the first day of April in any year the amount of the license tax shall be one-half of the year's license, and if the license shall be taken out in any year prior to April 1, the license shall be taken out for the full term of one year.

The provisions of the Act above noted make a levy and fix the amount to be paid for the license and the fees to be paid therefor. The sections of the Code above cited have to do with the manner of acquiring the license. Section 4258 of the Code of Alabama, 1923, authorizes the Probate Judge, where the license has been surrendered voluntarily by the licensee, to issue a new license to another person **to continue said business,** and in such event credit shall be given for the unused portion of said surrendered license. The language of the sections says a new license shall issue under this provision, and it shall be issued for the purpose of continuing the business for which the first license was issued. The new owner or proposed licenses is required to take out the regular license, and be credited with the unused portion of the prior owner's license. This new licensee must comply with the provisions of Section 4257 of the Code, wherein the mode is prescribed to procure a license.

These views are supported by the opinion of this office rendered August 2, 1932 (Office Edition Vol. XI, page 97). It is my opinion that under the conditions just above cited the holder of a license may voluntarily surrender the license and a new license issue to continue the business at any time during the life of the first license.

There is no conflict in the provisions of Section 4258 of the Code and Section 368 of the Revenue Act, appearing on page 564 of the General Acts of 1935. Section 368 of the Act, in the opening words thereof, says "unless otherwise provided," if any business license shall commence after April 1, etc. It did not say unless otherwise provided in this Act. A fair and reasonable construction of this phrase manifestly means unless otherwise provided by law. It is apparent that it is untenable to conclude that the Legislature intended to repeal Section 4258 of the Code, or any of its provisions. It is fair to conclude that the Legislature had in mind this Section when it used the words "unless otherwise provided" in the 1935 Act. To say the least, the words "unless otherwise provided" indicate that the Legislature had in mind other provisions which were to be excluded from the provisions set out in this section of the Act. The two provisions found in the Code and the Act have a just and reasonable field of operation for each. The license tax is levied upon the business to be operated (General Acts 1935, Section 348, page 441). Section 368 recognizes this when it provides for a levy on the business. Section 4256 of the Code authorizes the Probate Judge to license the business of operating a billiard room. Keeping this in mind, I will further examine Section 368 of the Revenue Act and Section 4258 of the Code of Alabama, 1923, to ascertain whether or not they each have a field of operation.

Section 368 of the Revenue Act is dealing solely with a business that **commences** either after April 1, or where the business **commences** prior to such date. It is dealing with a license for a business that has commenced and has had no license therefor during that period. Section 4258 of the Code is dealing with a case where the license in the first instance is relinquished under an existing business for which the owner had acquired a license. When he surrenders the license the Probate Judge issues a new license to the new licensee **"to continue said business."** (Emphasis supplied). To continue what business? The expression "said business" necessarily means the business of operating a pool room for which the first license was surrendered. It is not a license for a business that is commenced for which no license theretofore had been issued.

There is no conflict whatever in Section 4258 of the Code of Alabama, 1923, and Section 368 of the Revenue Act, much less an irreconcilable conflict. The law is so well understood and known that statutes are not to be repealed by mere implication that it is unnecessary to cite authority to that principle. I have made a rather extended investigation and search, and have been unable to find any decision of the courts or opinions in this office that are contrary to the views here expressed.

To put in operation the surrender and credit provisions of Section 4258 of the Code of Alabama, 1923, the surrender of the license must be made by the licensee. There is nothing in the record before us to show what connection or interest Daniel Kinney, Jr. and C. C. Chapman had in "Pastime Billiard Parlor." The original license was issued to it by that name. Under the record submitted to me, for the reasons given herein, I must answer your three questions in the negative. However, it may be that evidence was before you that reasonably satisfied you that Kinney and Chapman were the owners or managers of the "Pastime Billiard Parlor" at the time the original license was issued in its name, and, in fact, were the real licensees. If this

is true, then they had the right to voluntarily surrender to you the original license, and you were authorized to issue a new license and give credit to the new licensee for the unused portion of the surrendered license. If the facts are as herein last stated, then my answer to your questions are as follows:

1. You have authority to issue a new license to Robert C. McAnnally for the remaining part of the tax year 1940-1941, and you are entitled to the same fee and charges as if no license had theretofore been issued on that business for that tax year.

2. The surrendered license should be accepted and a new licensee should pay only the amount due for an annual license after credit is given for the unused portion of the surrendered license.

3. I am unable to answer this question, because of the uncertainty of the facts and the record before me, as above pointed out.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 2, 1941.

Hon. J. M. Hobbie,
Tax Collector,
Montgomery County,
Montgomery, Alabama.

Soldiers' and Sailors' Civil Relief Act of 1940 — Taxation — Effect of the Soldiers' and Sailors' Civil Relief Act of 1940 on the collection of taxes —

Opinion by Assistant Attorney General Osborn.

Dear Sir:

I have your letter of March 6, 1941, in which you request my opinion as follows:

"It is my information that under the various recent acts and resolutions passed by the Congress of the United States in relation to the National Defense, those persons who are called into, or voluntarily enter, the active service of the armed forces of the United States are granted certain relief from ad valorem taxes.

"I will thank you to advise me on the following questions in regard to this matter:

"1. Just what relief is granted?

"2. Does it apply to taxes on property other than real property?

"3. Does it apply to taxes on all real property, or only to certain particular types of real property?

"4. Does it apply to State, county, school and city taxes on such property, or only to some of such taxes?

"5. As you know, State, county and school taxes in this State become due on October 1 of each year, and delinquent January 1 following, and city taxes become due on December 1 of the tax year and delinquent January 1 following. Would a person otherwise entitled to such relief be entitled thereto if he entered the active service of the armed forces of the United States after such taxes become due, but before they became delinquent?

"6. Would such a person be entitled to such relief from taxes that were already due and delinquent, but unpaid at the time he entered the active service of the armed forces of the United Stats?

"7. Is this relief granted to all persons now in the active service of any of the armed forces of the United States, regardless of the method by which they might have entered the active service of the armed forces of the United States?

"8. If it does not apply to all persons now in the active service of the armed forces of the United States, to which of such persons does it apply?"

The various recent acts and resolutions of Congress in regard to persons called into the armed forces of the United States in connection with our national defense are as folllows:

1. The resolution of the United States Congress providing for active military service of the National Guard, Reserve and Retired Personnel, is Public Resolution No. 96, 76th Congress, Chapter 689, Third Session, Senate Joint Resolution No. 286, approved August 27, 1940, and found at page 850 of Pamphlet No. 8 of the 1940 Cumulative Index to the United States Code Congressional Service.

2. The Selective Training & Service Act of 1940 is Public Laws No. 783, 76th Congress, Chapter 720, Third Session, Senate 4164, approved September 16, 1940, and found at page 879 of Pamphlet No. 8 of the 1940 Cumulative Index to the United States Code Congressional Service.

3. The Soldiers' and Sailors' Civil Relief Act of 1940 is Public Laws No. 861, 76th Congress, Chapter 888, Third Session, Senate 4270, approved October 17, 1940, and found at page 1176 of Pamphlet No. 10 of the 1940 Cumulative Index to the United States Code Congressional Service.

In this opinion, I will be primarily concerned with the last cited act above, commonly called the Soldiers' and Sailors' Civil Relief Act of 1940.

I will answer your questions in seriatim.

1. Since in your letter you indicate that you are desirous of ascertaining the relief granted from ad valorem taxes, I assume that your first inquiry is: What relief from such taxes is granted?

Article 5 of the Soldiers' and Sailors' Civil Relief Act reads in Section 500 as follows:

"Sec. 500. (1) The provisions of this Section shall apply when any taxes or assessments, whether general or special, falling due during the period of military service in respect of real property owned and occupied for dwelling, agricultural, or business purposes by a person in military service or his dependents at the commencement of his period of military service and still so occupied by his dependents or employees are not paid.

"(2) When any person in military service, or any person in his behalf, shall file with the collector of taxes, or other officer whose duty it is to enforce the collection of taxes or assessments, an affidavit showing (a) that a tax or assessment has been assessed upon property which is the subject of this section, (b) that such tax or assessment is unpaid, and (c) that by reason of such military service the ability of such person to pay such tax or assessment is materially affected, no sale of such property shall be made to enforce the collection of such tax or assessment, or any proceeding or action for such purpose commenced, except upon leave of court granted upon an application made therefor by such collector or other officer. The court thereupon may stay such proceedings or such sale, as provided in this Act, for a period extending not more than six months after the termination of the period of military service of such person.

"(3) When by law such property may be sold or forfeited to enforce the collection of such tax or assessment, such person in military service shall have the right to redeem or commence an action to redeem such property, at any time not later than six months after the termination of such service, but in no case later than six months after the date when this Act ceases to be in force; but this shall not be taken to shorten any period, now or hereafter provided by the laws of any State or Territory for such redemption.

"(4) Whenever any tax or assessment shall not be paid when due, such tax or assessment due and unpaid shall bear interest, until paid at the rate of 6 per centum per annum, and no other penalty or interest shall be incurred by reason of such nonpayment. Any lien for such unpaid taxes or assessment shall also include such interest thereon.

"(5) The Secretary of War, the Secretary of the Navy, and the Secretary of the Treasury shall make provision in such manner as each may

deem appropriate for his respective department, to insure the giving of notice to persons in the military service under their respective jurisdictions, of the benefits accorded by this section and the action made necessary to claim those benefits in each case."

It is seen, therefore, that if a person owns and occupies at the commencement of his military service real property for dwelling, agricultural, or business purposes which property is still occupied by his dependents or employees, and on which property taxes fall due during his period of military service, and if an affidavit is filed with the collector of taxes showing:

(a) That a tax or assessment has been assessed upon such property,

(b) That such tax or assessment is unpaid, and

(c) That by reason of such military service the ability to pay such tax or assessment is materially affected,

such person is entitled to the following relief: No sale, action or proceeding to enforce the collection of a tax or assessment may be commenced except with the court's permission upon application by the collector of the tax, and the court may stay such proceeding or sale for not more than six months after the termination of the period of military service. The unpaid tax or assessment shall bear interest at 6 percent per annum but no other interest or penalty shall be incurred (sec. 500).

In the cases of sale or forfeiture for nonpayment of taxes the person in military service has the right to redeem or commence an action to redeem within six months after the military service. This time limitation, however, does not shorten any period for redemption now or hereafter provided by the laws of any State or Territory (Sec. 500 (3)).

2. The specific exemption contained in Article 5, Section 500, supra, is applicable only to real property. However, the general relief provision of the act (Section 200) seems to prohibit the sale of personal property for nonpayment of taxes.

Section 200 of the act provides in subsection (1) as follows:

"Sec. 200 (1) In any action or proceeding commenced in any court, if there shall be a default of any appearance by the defendant, the plaintiff, before entering judgment shall file in the court an affidavit setting forth facts showing that the defendant is not in military service. If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service. If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court directing such entry, and no such order shall be made if the defendant is in such service until after the court shall have appointed an attorney to represent defendant and protect his interest, and the court shall on application make such ap-

pointment. Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part. And the court may make such other and further order or enter such judgment as in its opinion may be necessary to protect the rights of the defendant under this Act."

Since it is necessary that proceedings be instituted in court to sell personal property for nonpayment of taxes, it seems that such a proceeding must conform to Section 200 (1), supra. It is to be noted, however, that the granting of a stay of proceedings is largely within the discretion of the court. There is no automatic moratoria as to civil obligations during military service. The Court may, on its own motion, and shall, on an application by a person in military service or his representative during the period of service or sixty days thereafter, grant a stay of proceedings unless in the opinion of the court the ability of the plaintiff to prosecute the action or of the defendant to conduct his defense is not materially affected by his military service (Sec. 201). The stay is limited to "the period of military service and 3 months thereafter or any part of such periods" (six months in regard to real property, and is subject to such terms as the court in its discretion may impose (sec. 204).

3. The relief granted in Section 500, supra, extends only to real property owned and occupied at the commencement of the person's military service for dwelling, agricultural or business purposes. Also, the property must still be occupied by his dependents or employees.

4. It is to be noted that the provisions of this Act apply to all states as is provided in Section 102 (1), which reads as follows:

"Sec. 102. (1) The provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, including the Philippine Islands while under the sovereignty of the United States, and to proceedings commenced in any court therein, and shall be enforced through the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed."

In Section 500 (1) it is noted that "the provisions of this section shall apply when any taxes or assessments, whether general or special" fall due during the period of military service. From these words, it is my opinion that the relief applies to state, county, school and city taxes.

5. A true interpretation of Section 500 (1), supra, leads to the conclusion that the relief therein provided only applies to taxes **falling due after** the commencement of the military service, and, hence, this relief would not apply to taxes that fall due before the commencement of military service, even though not delinquent. However, if proceedings are instituted to collect such taxes, the provisions of Section 200 (1) must be complied with and then it becomes a discretionary matter with the court as to whether or not

action can be taken to enforce the collection of the taxes, the only difference being that set out in answer to question no. 2.

6. Of course, as pointed out above, the relief granted in Section 500 (1) applies only to taxes which fall due after the beginning of the military service. However, here, again, if action is taken to enforce the payment of the delinquent taxes (delinquent at the time of the beginning of the military service), such action would have to conform to Section 200 (1) as discussed above.

7. The relief contained in the Soldiers' and Sailors' Relief Act of 1940 applies to "all persons in military service." Service 101 (1) reads as follows:

> "Sec. 101. (1) The term 'persons in military service' and the term 'persons in the military service of the United States,' as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term 'military service', as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms 'active Service' or 'active duty' shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause."

This language is broad enough to include the National Guard. It will be noted that the term "all members of the Army of the United States" is used in this section defining application. This term is defined in Title 10, Chapter 1, Section 2, U. S. C. A., which reads as follows:

> "Sec. 2. Composition of Army of United States. The army of the United States shall consist of the regular army, **the National Guard while in the service of the United States,** and the organized reserves, including the Officers Reserve Corps, and the enlisted reserve corps." (Emphasis supplied)

Of course, the National Guard is at the present time in the active service of the United States, since it has been called out under the authority of Senate Joint Resolution 286, supra.

Therefore, it appears that the act is all-inclusive in its application, and the method of entering the service is immaterial.

8. In view of my answer to your inquiry no. 7, it is not necessary to answer this inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 3, 1941.

Hon. J. A. Williams, Register,
Circuit Court in Equity, Chambers County,
LaFayette, Alabama.

Registers —

Fee for preparing transcript of record for Supreme Court and copies thereof, including office copy, on appeal, discussed. (Section 6102, Code of Alabama, 1923, and Section 7283, Code of Alabama, 1923.)

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of September 18, 1940, is as follows:

"I hereby request your opinion on the following:

"1. Please give me the fees that I, as Register for the Circuit Court in Equity, Chambers County, Alabama, would be allowed to charge for preparing the original transcript of record for Supreme Court under Section 7283 of the Code of Alabama 1923, which provides: 'Record for Supreme Court for each 100 words—15c,' and, 'each additional copy thereof for each 100 words 5c'; and the provisions of said Section 7283 seem to be in conflict with the provisions of Section 6102 of the Code of Alabama 1923, which provides that the Register charge 10c per 100 words for the original transcript and 5c per 100 words for each additional copy thereof.

"2. Please give me your opinion as to whether or not I am correct, as Register for the Circuit Court in Equity, in charging in the cost bill 15c per 100 words for preparing the original transcript of the record for the Supreme Court, and in charging 5c per 100 words for each additional copy of said record, including the office copy, and including a copy of the record furnished to the Attorney for one set of respondents of appellees, and including a copy furnished to the attorney for another set of respondents or appellees, and including a copy furnished to the attorney for the appellant, all of said attorneys having requested that said copies be furnished them."

Your inquiries have heretofore been answered by an opinion rendered by this office under date of June 24, 1938, to Hon. Wm. D. Peeler, Register, Circuit Court in Equity of Lauderdale County (Biennial Report of Attorney General, 1936-1938, page 664).

It is my judgment, however, that the Peeler opinion is laid in error and should be overruled.

JAMES F MATTHEWS

I have reached this conclusion only after a careful study of the applicable statutes. I have found that the statement in the Peeler opinion that "Under the Code of 1907 there was no duty upon the register to supply the appellee with a copy of a transcript in a case appealed to the Supreme Court and the present Section 7283 of the Code of Alabama, 1923, was then the effective law," is not entirely accurate, for my investigation has revealed that the pertinent portion of Section 7283 of the Code of Alabama, 1923, was not existent in the Code of 1907 but was added by the 1923 Code Committee. Also inaccurate is the statement that Section 6102 (first enacted in 1915 by Section 2 of Act No. 645, S. 501, approved September 22, 1915, General Acts, 1915, page 711, and amended by Act No. 97, H. 285, approved February 15, 1919, General Acts, 1919, page 84, 85) is the later provision with respect to the fees to which registers are entitled for preparing the transcript of record on appeal. Since that portion of Section 7283 relating to the fees for preparing transcript of record on appeal was added by the Code Committee of 1923, it is obvious that the major premise of the Peeler opinion, i. e., that Section 6102 was the latest enactment, and the conclusion drawn from such premise, i.e., that therefore 6102 must control, is erroneous.

Since, as I have stated, Section 3718 of the Code of 1907, the predecessor of Section 7283, enumerating the fees allowed the register, does not include the items relating to fees for preparing records for the Supreme Court, and since a thorough search of the General Acts of 1909, 1911, 1915, 1919, 1920, 1921 and 1923 reveales no enactment of an amendment to Section 3718 to include a provision for fees for preparing the record for Appellate Courts, I am forced to conclude, upon the authority of **Middleton v. General Water Works and Electric Corp.**, 25 Ala. App. 455, 149 So. 351, cert. den. 227 Ala. 219, 149 So. 352, that Section 7283 of the Code of 1923, being the latest enactment, must prevail over Section 6102, unless there can be found in Section 7283 something to indicate that a contrary intent was entertained by the codifiers, and the Legislature which adopted the 1923 Code.

Section 7283, as pertinent, provides the following fees for registers for preparing the record on appeal:

> "Record for Supreme Court, for each 100 words, **when not otherwise provided for herein** 15c
>
> "For each additional copy of any record for the Supreme Court for each 100 words ..... 05c."
> (Emphasis supplied)

The question is thus presented as to whether the underlined expression, as shown above, can be deemed to limit the provisions of Section 7283 by bringing into operation Section 6102 of the Code of 1923, supra.

I cannot believe that it can be logically argued, when all pertinent matters are considered, that Section 6102 is brought into operation by the underlined words.

The general rule of construction in this regard which is followed by the Courts in interpreting the statutes is that "qualifying words or phrases are

to be applied to the words or phrases immediately preceding." 59 C. J. 985, Sec. 583; **Miller v. Butterfield,** 125 U. S. 70; **Puget Sound Electric Railway v. Benson,** 253 Fed. 710; **Stevens v. Illinois Central Railway Co.,** 306 Ill. 370, 137 N. E. 859; **State v. State Agricultural Credit Corp. Inc.,** 176 La. 590, 146 So. 159; **Marquette Cement Manufacturing Co. v. Fidelity and Deposit Co.** (Miss.), 158 So. 924.

Following this rule, it is my opinion that the qualifying words "when not otherwise provided for herein" relate to the immediately preceding phrase "for each 100 words." That this is a logical conclusion appears when the following itemization provided as to copies is considered. This is:

" * * * for each 100 words ..... 5c."

It appears, therefore, that the qualifying words in the first sentence considered should be read: "for each 100 words 15c, except for copies provided for in this section, which copies shall be at the rate of 5c per hundred words."

Following this reasoning to its logical end, it is only necessary to observe that if the Legislature or Code Officials had intended to bring into operation some other statute in addition to Section 7283, the phraseology of the applicable part of Section 7283 should have read, and would doubtless have read:

"Record for Supreme Court, **when not otherwise provided for herein,** for each 100 words ..... 15c."

With this arrangement of the underlined qualifying words, such words would have related to the next preceding words "Record for Supreme Court," and the statute could have been reasonably interpreted as referring to Section 6102. However, the Section reads:

"Record for Supreme Court, for each 100 words, **when not otherwise provided for herein** ..... 15c,"

and the underlined qualifying words relate to the next preceding phrase "for each 100 words."

This conclusion finds additional logical support in the fact that the Appellate Courts of this State have held that under Section 7278 of the Code of 1923, relative to fees of Clerks of the Circuit Courts, the **Clerks** are entitled to 15c per 100 words of the record for the Supreme Court, and 5c for each copy (**Middleton v. General Water Works and Electric Corp.,** supra).

The effect of this decision was to hold that Section 7278 superseded Section 6102. An intention could not logically be imputed to the Legislature or to the authorities charged with the codifying of the laws of this State to have provided one schedule of fees for the **Clerk** and a different schedule of fees for the **Register** for preparing the transcript on appeal when the duties of both in such regard are identical, and where, in so many instances, the same officer performs the duties of both Clerk and Register.

There is yet a further fact which strengthens my conclusion regarding the Legislative intent in this respect. It appears from an examination of the reports from the minutes of the Code Committee to the Legislature of Alabama, 1940, that the Committee, in preparing the Alabama Code of 1940, has changed the words "ten cents" where the same appear in Section 6102 to "fifteen cents," thus doing away with all conflict. This change was adopted by the Legislature of 1939, thus indicating that both the Code Committee and the Legislature, after thorough consideration, had determined that the true intention of the Legislative body which adopted the 1923 Code was to permit the Register to receive the same fees for preparing the transcript on appeal as was allowed to Clerks for the same service.

You are, therefore, advised that the fees to be charged by the Register for preparing transcripts or record on appeal are those provided for by Section 7283, i. e., for the record for the Supreme Court, 15c per hundred words, and for copies of records for the Supreme Court, 5c per hundred words.

In holding hereinabove that the Register is entitled to 5c for each 100 words for each copy, **including the office copy,** I have not been unmindful that by Section 6108 it is provided:

> "6108. Copy of record of appealed cases kept by clerks; fees for.—The clerks of all courts from which an appeal lies to the supreme court or court of appeals, shall be required to make and keep on file in their office an exact copy of the record in all cases certified to said supreme court or court of appeals for use by the parties to such cases. **And such clerks shall be permitted to charge, to be taxed as costs of appeals in such cases the sum of two dollars and fifty cents for such copy of the record."** (Emphasis supplied)

However, I have not found a field of operation for the underlined portion of Section 6108 providing the sum of $2.50 for the copy of the record on appeal, and I am inclined to believe that this portion of the section was inserted by the codifiers of the 1923 Code and approved by the Legislature at that time through error. I base my conclusion that this provision was included through error, in large part, upon an opinion rendered on December 26, 1919, to Hon. Wm. J. Waldrop, Clerk of the Circuit Court, Birmingham, Alabama (Biennial Report of Attorney General, 1918-1920, page 375), which opinion furnishes an insight into the state of the law at that time. This opinion holds that by the enactment of Act No. 639, S. 186, approved September 30, 1919, General Acts, 1919, page 884, amending Section 3713 of the Code of 1907 (now Section 7278 of the Code of Alabama, 1923, relating to fees allowed to clerks of circuit courts), by inserting a provision for the collection of fees for preparing transcripts to the Supreme Court, the Legislature had merely provided a "uniform charge of 5c for each 100 words for the transcript kept in the clerk's office instead of a flat rate of $2.50 in each case." The opinion concludes:

> "I am of the opinion that the act of 1915, page 337, providing for a charge of $2.50 for copy of the transcript to be kept in the office of the clerk, is superseded by the act of 1919 (page 884), which provides for a charge of 5c per 100 words for all copies of the transcript."

It appears that, despite this opinion, the provision for the $2.50 charge was carried forward into the 1923 Code.

This, I believe, was an oversight. **Cf. Middleton v. General Water Works and Electric Corp.,** supra.

The recent Code Committee, in preparing the Code of 1940, has taken cognizance of this apparent oversight and, as appears from the report from the minutes of the Code Committee to the Legislature (page 148), Section 6108 has been amended by striking the last sentence, it being noted in the report that this sentence is provided for in the title on "Costs" in the 1940 Code.

While I have concluded above that Section 7283 supersedes Section 6102 in so far as the limit of 10c per hundred words for the record on appeal is concerned, there is, in my opinion, a definite field of operation for Section 6102 in that such Section limits the number of copies, the cost of which may be charged against the unsuccessful party on appeal.

Section 6102 is as follows:

> "6102. Transcript made by clerk; fees for. — After taking an appeal in the manner herein provided, and filing in the cause a bill of exceptions, or the expiration of the time for filing such bill of exceptions, or if the appellant sooner direct, the clerk, the register, or judge of probate, as the case may be, shall make out a transcript as required by law, and deliver the same to the appellant. He shall in making the transcript make a copy thereof for **the appellee** and **deliver it to him or his attorney,** and for the transcript he shall have ten cents for each one hundred words and for the copy five cents for each hundred words, **both of which** shall be taxed as costs against the unsuccessful party in the appeal. The appellant shall be entitled to procure a copy of said transcript by paying therefor at the rate of five cents for each one hundred words; provided the appellant make request of the clerk, register, or judge of probate before the preparation of the original transcript." (Emphasis supplied)

This section contains the only authority for an appellee or appellant to secure copies of transcript or record on appeal. You will note that the section allows only a **single** copy to a **single** appellee. You will also note that the provision relative to the right of the appellant to secure a copy of the transcript or record authorizes the appellant to procure copy only by paying therefor, no authority being given by Section 6102 to charge this item as costs.

It is my opinion that this Section, which is the only one which I have found providing for copies to be furnished the appellee and appellant, authorizes the Register to charge as cost only one copy of the transcript or record furnished the appellee, and that this Section does not authorize the inclusion in the cost bill of the cost of the copy furnished the appellant at his request. The law of costs and fees is to be held to be penal, and no costs can be allowed other than specifically provided in the statute. See Section 7255 of the Code of Alabama, 1923. **Troup v. Morgan County,** 109 Ala. 162, 19 So. 503.

There being no provision of law authorizing the Register to include in the cost bill more than one copy of the transcript or record furnished a single appellee, and there being no authority for the Register to include in the cost bill copy furnished the appellant, you are advised that under the facts detailed in your inquiry:

1. You may charge as costs 15c for each one hundred words of the record for the Supreme Court.

2. You may charge as costs 5c for each one hundred words for the office copy.

3. You may charge as costs 5c for each one hundred words of the copy of the record furnished to the attorney for one set of respondents or appellees.

4. You may **not** include in the cost bill the cost of the copy of the record furnished to other sets of respondents or appellees.

5. You may **not** include in the cost of furnishing a copy to the attorney for the appellant, this being a matter of contract rather than an item of cost.

The opinions of this office reported in Biennial Report of Attorney General, 1930-1932, page 364, and Biennial Report of Attorney General, 1936-1938, page 664, are hereby overruled and withdrawn in so far as the same are in conflict with the foregoing conclusions.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 3, 1941.

Hon. Irby Pope,
Judge of Probate,
Perry County,
Marion, Alabama.

Automobile Dealers — Licenses —

Automobile dealer maintaining an established place of business in one county and regularly selling automobiles from fixed location on public square in another county, must secure license prescribed by Schedule 12(b) of the Revenue Laws of 1935, as amended by General Acts of 1939, page 497, for privilege of conducting business in second county.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion bearing date of October 10, 1940, follows:

"Schedule 12 of the 1935 Revenue Act, as amended provides that each person dealing in, selling, etc., automobiles, etc., shall pay an annual State License of $30.00 (in Perry County), and a County License of one-half the amount of his State license for the use of the Counties. I am desirous of knowing whether a person should pay a State and County, or just County, or none at all, license if he has principal place of business in Selma, comes over to Marion once or twice a week, parks his cars in the same place, on the Court House Square, does not have a building for his business, but as stated above, is in the same location on the street every week, for one or two days, especially every Saturday."

The statute applicable to your request is found in General Acts of 1939, page 497. This Act (Act No. 370, H. 352, approved September 22, 1939) amends Schedule 12 of the Revenue Laws of 1935, as amended, and is, as pertinent, as follows:

"Schedule 12. Each person dealing in, selling or purchasing for resale automobiles, trucks or other self-propelled vehicles, other than motor-cycles, tractors or other motor vehicles otherwise licensed, shall pay an annual State license as provided below, and shall pay a county license of one-half of the amount of his State license for the use of the counties. The following license shall be paid by each dealer, each agent or other person, except agents of a dealer who has procured the license herein required: In cities and towns of over 50,000 inhabitants . . . . . $140.00. In cities and towns of over 25,000 inhabitants and not exceeding 50,000 inhabitants . . . . $100.00 In cities and towns of over 10,000 and not exceeding 25,000 inhabitants . . . . $80.00 In cities and towns of over 5,000 inhabitants and not exceeding 10,000 inhabitants . . . . $65.00 In cities and towns of over 2,500 and not exceeding 5,000 inhabitants . . . . $50.00 In cities and towns of 2,500 inhabitants and less . . . . . $30.00 In all other places whether incorporated or not . . . . $30. (b) Provided, a person maintaining more than one place of business for the sale of automobiles, trucks or other self-propelled vehicles as above enumerated, shall pay an additional license of one-half of the license levied on his principal place of business for each additional place of business in excess of one; provided, a licensed dealer may maintain a used car lot for the sale of used or second-half cars, without the payment of an additional license. * * *

"Schedule 12½. Each person, dealer or agent selling, offering to sell, or soliciting orders for the sale of motor vehicles to the ultimate consumer, who does not maintain a regularly established place of business in this State for the sale of such motor vehicles, shall be required to pay an annual license of $200.00 for use of the State and $100 for use of the county. Both a State and county license shall be payable in each county in which such person engages in any of the activities herein mentioned in this subsection. All laws, general, special or local, in con-

flict with the provision of this Act are hereby repealed except the sales or use tax. The Act shall become effective upon its passage and approval by the Governor."

You state in your letter of inquiry that the party in question maintains his principal place of business in Selma. It is apparent, therefore, that Schedule 12½, quoted above, will not be applicable for the reason that there is therein provided a license on persons, etc. who do not maintain a regularly established place of business in this State for the sale of motor vehicles.

The question, therefore, remains: Does a person who has one established place of business in one county and who parks his cars in the same place on the courthouse square in another county once or twice a week, and there offers said cars for sale, maintain a place of business for the sale of automobiles in the second county so as to cause him to be liable for license in the second county?

It is my opinion that such person is liable for the license prescribed by Subsection (b) of Schedule 12, as amended, above. You will observe that Schedule 12 is a part of the general licensing provisions of the Revenue Laws of 1935. Section 348 of the Revenue Laws of 1935, Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 256) requires that every person, etc., "engaged in any business, vocation, occupation, calling or profession, herein enumerated, of who shall exercise any privilege hereafter prescribed, for which a license or privilege tax is required, shall first procure a State license and a County license when so required, and shall pay for the same, or **shall pay for the exercise of such privilege,** the amounts hereafter provided. * * * * " Schedule 12, as amended, purports to license the privilege of dealing in, selling, etc. automobiles, etc.

Under the facts stated by you in your letter of inquiry, it is apparent that the party therein mentioned is exercising the privilege for which a license is required; i. e., he is dealing in and selling automobiles.

It is true that Subsection (b) of Schedule 12 contains the language "maintaining more than one place of business." However, it is my opinion that the party in question is, in fact, maintaining a place of business for the sale of automobiles.

Certainly, these words must be given their natural, plain, ordinary and commonly understood meaning. 18 Ala. Dig., Statutes, Key No. 188. Among other definitions of the word "maintain" are "to carry on; to keep possession of." Cf. **F. W. Woolworth v. Erickson,** 221 Ala. 5, 8, 127 So. 534. A "place" has been defined as "any piece of ground appropriated by the occupier for the time being." "Place" expresses a particular locality. See **Words and Phrases.**

Applying these definitions to the language used in Subsection (b) of Schedule 12, supra, and paraphrasing that provision, we have the following:

"Provided a person keeping possession of more than one particular locality appropriated by the occupier for the time being for the sale of automobiles, etc., shall pay, etc."

The mere fact that the "place maintained" happens to be located on a public square does not prevent the imposition of the license. Opinions of Attorney General, Office Edition, Volume II, page 57.

Taking this view of the statute, it is my opinion that the license should be collected from the person concerning whom you inquire. Cf. Quarterly Report of Attorney General, Volume I, page 255.

This conclusion is strengthened when it is observed that in Schedule 12½, supra, the words "legally established" are employed to indicate permanency, whereas, no such language is used in Subsection (b), supra. It is my opinion that the absence of these words in Subsection (b) may be taken as an indication of the legislative intention that the place of business maintained need not be of a permanent nature; i. e., that the place maintained need not be a permanent structure, but on the contrary, that the place maintained may include locations of the nature herein considered.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 3, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
CAPITOL.

Revenue Act 1935, Section 348, Schedule 31 — Licenses — Carbonic Acid Gas —

Manufacturing using carbonic acid gas produced by him from combustion of his own fuel on his own premises, and not purchased or acquired otherwise, and used exclusively in manufacturing an unrelated article of commerce for the market is not subject to tax imposed by Schedule 31 of Section 348 of Revenue Act of 1935 (General Act 1935, pages 256, 450).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of March 21, 1941, in which you request my official opinion as follows:

"Re: Carbonic Acid Gas Tax Under Schedule 31 of Section 348 of the General Laws of 1935.

"The Ruberoid Company, a company engaged in the manufacture of asbestos shingles and other asbestos products advises that it proposes to make certain changes in its method of manufacture, seasoning or curing of such products, and instead of purchasing carbonic acid gas or carbon dioxide for use in its manufacturing process, it proposes to to adopt one or the other of the following methods of operation, namely:

"'(1). In the courses of its manufacturing operation, the Ruberoid Co. consumes fuel of which the following types are either in use or contemplated, viz: coal, fuel oil, coke or natural gas. The smoke and products of combustion from the fuel are at the present time expelled through the flue into the stack. Such products of combustion contain CO_2 gas (carbon dioxide). It is contemplated that the smoke and gases be washed or filtered and when cleaned, used for purpose of treating the shingles. The gas will not be stored in any tank but will go directly into the chamber in which the shingles are treated. The product from the flue will contain a percentage of CO_2 (carbon dioxide). If the Ruberoid Co. adopts this course of treating this product, will it be subject to the tax on "carbonic acid gas?"

"'(2). In connection with its manufacturing operations, The Ruberoid Co. may use an internal combustion engine for the purpose of generating power or electricity. The exhaust gases of this engine may be filtered or washed and conveyed to the chamber for treating the shingles and sidings. The exhaust gases will contain a percentage of CO_2 gas (carbon dioxide) which will not be stored in any tanks or cylinders. Will this method of operation be taxable?

"'(3). The Ruberoid Co. may, as an alternative use chemicals such as soda ash (which contains a percentage of CO_2 gas (carbon dioxide)) in combination with toxic chemicals for treating its shingles and sidings. This chemical combination will be dissolved in water in such a way that carbonic acid will not be liberated. This chemical combination will not be stored in cylinders or tanks. Soda ash, as you are undoubtedly aware, is the chemical used by householders and is found in soaps and powders. I do not believe that bottlers or other manufacturers of carbonated beverages use this chemical combination. If this method of treatment is adopted, will the operation of Ruberoid be taxable?'

"This concern has requested the Department to advise whether or not the Department will construe such production and use of carbonic acid gas or carbon dioxide as taxable under the provisions of Schedule 31 of Section 348 of the General Revenue Act of 1935.

"Before advising the taxpayer on this subject, we desire to obtain an official opinion from you as to whether or not the adoption by such

manufacturer will subject it to the payment of said tax under the provisions of said Schedule 31."

Schedule 31 of Section 348 of the Revenue Act of 1935 (General Acts 1935, pages 256, 450) is as follows:

"Schedule 31. Each person selling, distributing and/or using carbonic acid gas or any substitute therefor, for any purpose, shall pay a privilege license tax equal to two cents on each pound of carbonic acid gas or any substitute therefor sold, distributed and/or used. Each person selling, distributing and/or using carbonic acid gas or any substitute therefor, shall, at the end of each calendar quarterly period make report on oath to the State Tax Commission in the manner and upon forms required by it, the number of pounds of carbonic acid gas or substitute therefor, sold, distributed and/or used by him during the preceding quarter and at the same time pay the amount of tax due on the number of pounds so sold, distributed and/or used. In addition to any other requirements each person selling and/or distributing carbonic acid gas or any substitute therefore (sic) shall show on each report the name of each person to whom carbonic acid gas or any substitute therefor was sold and the number of pounds so sold and/or distributed and the date of each sale or distribution. Every person using for any purpose carbonic acid gas or any substitute therefor upon which the tax levied in this Schedule has not been paid by the seller or distributor shall make a report on oath, at the end of each calendar quarterly period to the State Tax Commission in the manner required by it, the number of pounds of carbonic acid gas or any substitute therefor purchased or acquired during the preceding quarter stating the date of each transaction, from whom purchased or acquired, the address or location of such person and the number of pounds so purchased or acquired in each transaction and at the same time pay the tax levied by this Schedule. If the reports and payment of the tax required by this Schedule are not made within thirty days after due date a penalty of double the amount of the tax due shall be assessed and collected. No additional license or tax on carbonic gas or substitute therefor, shall be charged or levied by any county. One-third of said license shall be paid by the State to the county in which said bottling works is located."

Whether a manufacturer who produces carbon dioxide at his own plant by combustion of such fuels as coal, fuel oil, coke and natural gas and uses such carbon dioxide exclusively in the process of manufacturing a finished product for the market is within the provisions of the Schedule and must pay the tax thereby imposed, is the problem for solution.

From the facts stated in the request it is clear that the manufacturer neither sells nor buys carbon dioxide. Whether he acquires it by producing it in the manner stated may be a matter of juggling words or hair-splitting distinctions, depending on the meaning of the word **acquire.** Certain it is, however, that the manufacturer in a sense **uses** such gas just as he uses also the aforementioned fuels to produce the gas. Perhaps it would be more accurate to say the he **produces** the gas **for use** in his manufacturing business, and uses said fuels for that purpose, and other purposes.

Thus, it would appear that the questioned schedule is sufficiently vague, ambiguous or uncertain to require the application of certain will known rules of statutory construction in order to solve the problem, and to find the "legislative intent" to be deduced from the legislative enactment, as so often occurs.

In Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, on page 430, (62 So. 712), it was observed:

> "The common-law rights of a citizen occupy a high plane of sanctity, for they are inherited rights.
>
> "For this reason it is a general rule of construction of statutes that there are certain objects which the Legislature is presumed not to intend; and a construction which would lead to any of them is therefore to be avoided. It is found sometimes necessary to depart not only from the primary and literal meaning of words, but also from the rules of grammatical construction, when it is improbable that they express the real intention of the Legislature; it being more reasonable to hold that the Legislature expressed its intention in a slovenly manner than that it intended something which it is presumed not to intend."

With this test in mind I find it necessary to determine whether by Schedule 31, supra, considered in its entirety, the Legislature intended to tax the use of carbonic acid gas, or carbon dioxide (CO_2), for any and all purposes, by any and all persons, firms, or corporations, irrespective of how acquired, obtained, produced, used or handled.

The broad, sweeping generality of the first two sentences of the Schedule, of itself, and without consideration of succeeding sentences, would so indicate. The third sentence of the Schedule, however, refers apparently only to persons "selling and/or distributing" the gas, who are required to report the names of their vendees and distributees, the quantities "sold and/or distributed and the date of each sale or distribution."

In the next succeeding sentences attention is turned to **users** of the gas, "upon which the tax * * * has not been paid by the seller or distributor." Such persons (users) are required also to report "the number of pounds * * * purchased or acquired, * * * the date of each transaction, from whom purchased or acquired, the address or location of such person * * * and at the same time pay the tax" etc.

A penalty is then prescribed for delay in making the aforementioned reports and payments of tax, and this is followed by prohibition of levy of such taxes by counties, together with provisions for division thereof between the State and the county **"in which said bottling works is located."** (Emphasis ours).

It is not clear why here for the first and only time reference should be made to **bottling works,** or in what way bottling works come into the picture — out of a clear sky, so to speak. What was in the legislative mind at this point is a matter of conjecture perhaps; or it may be the Legislature

was then thinking of **bottlers** only, it being a matter of common knowledge, I believe, that such persons use vast quantities of carbonic acid gas in preparing their wares for the market as do also druggists in dispensation of fountain drinks.

The concluding reference to bottlers or bottling works rather, together with the preceding requirements as to reports and payment of the tax in each instance predicated on the details of sales, distributions, transactions, tend to indicate that the Schedule was intended to apply only to transactions between two or more parties, to wit, vendors and vendees, distributors and distributees, and not to apply to users, pure and simple, that is to say, to persons using their own gas, produced by themselves exclusively for their own exclusive use and not for sale or distribution, and used merely as a step in the process of manufacture of an unrelated article of commerce.

Reports are required to be made by users for the exclusive purpose, apparently, of checking up on **sellers** and **distributors**, who have escaped the tax, so that the tax so escaped may be collected from the user.

Any other interpretation, it seems to me would lead to unreasonable or absurd results, and would leave it open to the Legislature to tax the **privilege** of **using** coal, or using lumber, lime, cement, bricks or any kind of building materials, gasoline, coke, or what not, although the manufacturer might have already paid an ad valorem tax on such articles as raw materials, and a sales tax thereon also.

Such procedure under guise or color of a license or privilege tax could be employed to impose double taxation and discriminatory, arbitrary taxation, without any semblance of reasonable classification and in violation of constitutional provisions. **Constitution, 1901,** Sections 211, 214, 217.

The foregoing interpretation of Schedule 31 as not applicable to a manufacturer producing and using his own gas finds support in the long established rule of statutory construction whereby ambiguous taxing statutes are to be construed strictly against the taxing authority and in favor of the taxpayer. **National Linen Service Corporation v. State Tax Commission,** 237 Ala. 360, 186 So. 478; **State v. Seals Piano Co.,** 209 Ala. 93, 95 So. 451; 25 R.C.L. Sec. 307, p. 1092; 59 C. J. Section 670, pp. 1131-2.

In **National Linen Service Corporation v. State Tax Commission,** supra, on pages 364-7 it was said:

> "We do not think in Alabama the Legislature may impose a tax, **whether called an excise or not,** upon the mere use of property for the purpose of its ownership.
>
> "An ad valorem tax may not be levied on a man's house, and another tax (whether designated a privilege or license tax or what not, I interpolate) levied for the privilege of living in it; nor an ad valorem tax levied on a man's mule, and another tax for the privilege or working the mule, in making his crop." (Emphasis ours)

The fact therefore that grave doubt may exist as to the constitutionality of the statute if construed as applying to users merely, without regard to the source or origin of the gas, brings the Schedule within that rule of construction which demands such construction as will render it free of doubt as to constitutionality.

Anniston Manufacturing Co. v. Davis, 301 U. S. 337;

State v. Merrill, 218 Ala. 149;

Reynolds v. Collier, 204 Ala. 30.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 7, 1941.

Hon. D. B. Nelson, President,
Jury Commission,
Coffee County,
Elba, Alabama.

Jury Commission Act of 1939 discussed generally.

Opinion by Assistant Attorney General Osborn.

Dear Sir:

Your request for official opinion under date of January 21, 1941, is as follows:

"Certain questions have arisen concerning the powers and duties of the jury commissions under the provisions of an Act approved March 2, 1939. It will be greatly appreciated by myself and the other jury commissioners of Coffee Conuty if you will furnish me with answers to the questions hereinafter propounded at your earliest convenience.

"1. Section 13 of said Jury Commission Act provides that the jury commission shall meet in the courthouse at the County seat of the several counties **** on the first Monday in October each year, and shall make in a well bound book a roll etc. After this has been done, is it permissible for the commission to meet thereafter from time to time and add additional names to the jury roll and place such additional names in the jury box, unless the jury box has become exhausted or so far depleted that it will probably be exhausted at the next drawing of jurors, or unless a judge of the Circuit court or court of like jurisdiction shall order the jury commission to empty and refill the jury box?

"2. Is it necessary that the jury commission place on the jury roll and in the jury box the names of all persons deemed by it to possess the qualifications of jurors notwithstanding the fact that some of such persons might have served as jurors within the past year next preceding the date the jury roll is prepared and the jury box filled?

"3. When the jury roll is prepared, is it necessary that the name of each and every person appearing on the jury roll shall be placed on cards as prescribed by law and such cards placed in the jury box?

"4. When a special jury is drawn in a capital case, may the names of all special jurors drawn but who are not used in the case be replaced in the jury box before the next regular meeting of the jury commission or the next special meeting under Section 16 or Section 18?

"5. Coffee County has two divisions requiring two separate jury rolls and jury boxes, one for the Enterprise Division and another for the Elba Division. Is it permissible for the jury commission to meet and fill the jury box in one division beginning on the first Monday in October each year and meet and fill the jury box in the other division beginning on the third Monday in October each year, or is it necessary for the commission to remain continuously in session, Sundays excepted, until the jury rolls are prepared and the jury boxes filled for both divisions?

"6. Does the jury commission have the right and authority to meet on the first Monday in October and adjourn from time to time until the jury roll is prepared and the jury box filled as prescribed by law, or is it necessary for the commission to remain in session until the work is completed?

"7. Is it permissible for the jury commission in meeting to prepare the jury roll and fill the jury box to revise the jury roll theretofore prepared by striking therefrom the names of persons known to be dead or who in the opinion of the commission do not possess the qualifications for jury service, and add the names of such additional persons as the commission may deem to possess the qualifications for jury duty, and as so revised adopt the same as the jury roll; or is it necessary that an out and out new jury roll be prepared each time the commission meets as provided by law?

"8. It is customary in some counties for courts requiring jurors to return to the jury commission the cards drawn from the jury box containing the names of jurors. When the commission meets to prepare a new jury roll and refill the jury box, is it permissible to use these same cards or is it necessary for the Clerk to prepare new cards containing the names and other necessary data with respect to such jurors?

"9. Are the provisions of Section 17 of said Act requiring the Clerk of the commission to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by said act mandatory, or is there a sufficient compliance with the law if the clerk and the jury commissioners contact outstanding and reputable citi-

zens of each and every precinct in order to ascertain the names of persons possessing the requisite qualifications for jury duty. In other words the Clerk of the Coffee County jury commission may chance to see good and reputable men from Beat one in the Town of Elba and get from them information concerning who in Beat one are competent to serve as jurors, is it nevertheless necessary that the Clerk visit Beat one to comply with the provisions of Section 17 of the Act in this respect?

"10. Who is the proper custodian of the jury roll?"

Your questions will be answered in seriatim. It is well, however, to preface the discussion of your inquiries by a few general observations.

Act No. 59, S. 55, approved March 2, 1939, (General Acts, 1939, page 86,) is the act creating a jury commission in every county in this state, except those excluded in the provisions of Section 25 of said Act. Coffee County is not so excluded.

It will be noted, however, that any power or authority that has heretofore been conferred on jury boards and which has not been specifically repealed by Act No. 59 shall be in the future performed by the jury commission (Section 24 thereof) in addition to the duties prescribed by Act No. 59.

Your first question reads as follows:

"1. Section 13 of said Jury commission Act provides that the jury commission shall meet in the courthouse at the County seat of the several counties **** on the first Monday in October each year, and shall make in a well bound book a roll etc. After this has been done, is it permissible for the commission to meet thereafter from time to time and add additional names to the jury roll and place such additional names in the jury box, unless the jury box has become exhausted or so far depleted that it will probably be exhausted at the next drawing of jurors, or unless a judge of the Circuit Court or court of like jurisdiction shall order the jury commission to empty and refill the jury box?"

The Jury Commission Act discusses how and when the jury box shall be refilled. As is directed in Section 13 of the Act, the jury commission is required to meet every year on the first Monday in October to make a new jury roll and to refill the jury box. At least once each year, therefore, the jury box must be refilled. This must be done regardless of the names yet undrawn in the jury box. The act provides, however, for additional meetings of the jury commission for the purpose of refilling the jury box.

In Section 18 of the act, it is provided that the judge of the circuit court or court of like jurisdiction may require the jury boxes to be refilled by the jury commission at any time he deems it expedient. This action on the part of the judge is discretionary, as is shown by the very words of Section 18.

In addition to this exceptional meeting of the commission, as provided for in Section 18, there is also provided another method for meeting to refill the jury boxes. Section 16 of the act provides that the jury commission of its own

motion may refill the jury box when it appears that the same is exhausted or **that it will probably be exhausted** at the next drawing of jurors. Also it is provided that the commission must meet whenever it is necessary to do this. As to whether or not the jury box appears that it "will probably be exhausted at the next drawing" is a discretionary matter which addresses itself to the commission or the judge of the circuit court, as the case may be.

Your inquiry, therefore, cannot be categorically answered. It has been held that the commissions (or as formerly, Boards) can meet only as prescribed by law. **Wells v. State,** 94 Ala. 1, 10 So. 656. **O'Byrnes vs. State,** 51 Ala. 25. The wording of the statute indicates that the commission cannot meet "from time to time" to add names to the jury box and add names to the jury roll. On the other hand, however, when the jury box appears to be in danger of depletion the commission must meet and refill same from a new jury roll. If, therefore, the commission "from time to time" determines that the jury box is in need of additional names, it must meet to refill the same. **O'Byrnes vs. State,** supra. It is to be noted, however, that names may not be **added** to the jury roll and jury box but that the new names must be put on a new jury roll when the jury box is refilled under any of the three methods outlined above. Your inquiry can be answered in the negative to that extent. In other words, when additional names are to be placed in the jury box, it is required by the statute that the commission make a new jury roll from which the jury box is to be refilled. This holding is not in conflict with the opinion of this office to Hon. Ernest L. McClure, under date of August 23, 1937, Quarterly Report of Attorney General, Volume VIII, page 193 (which was rendered prior to the passage of the 1939 Act), but it merely an extension thereof. This is also true as to an opinion rendered to Hon. Fred Grantham, under date of August 26, 1939 (dealing with the 1939 Act), Quarterly Report of Attorney General, Volume XVII, page 147.

Your question No. 2 reads as follows:

> "2. Is it necessary that the jury commission place on the jury roll and in jury box the names of all persons deemed by it to possess the qualifications of jurors notwithstanding the fact that some of the persons might have served as jurors within the past year next preceding the date the jury roll is prepared and the jury box filled?"

This inquiry must be answered in the affirmative. Section 13 of the Jury Commission Act reads in pertinent part as follows:

> "Section 13. The Jury Commission shall meet **** on the first Monday in October in each year, and shall make **** a roll containing the name of every male citizen living in the county who possessed (sic) the qualifications herein prescribed and who is not exempt by law from serving on juries. **** Upon the completion of the roll, the jury commission shall cause to be prepared **** cards **** and shall have written **** on the cards the name **** of the person whose name has been placed on the jury roll ****. These cards shall be placed in a box **** ."

Also Section 17 of the Act reads in pertinent part as follows:

"Section 17. The Jury Commission is charged with the duty of seeing that the names of every person possessing the qualifications prescribed in this act shall serve as a juror and not exempted by law from jury duty, is placed on the jury roll and in the jury box **** ."

From the above quoted excerpt, it is seen that each year the names of all qualified male citizens except those exempt shall be placed on the jury roll and in the jury box. See Opinion to Hon. L. D. Dix, President, Jury Com--mission of Mobile County, under date of September 27, 1940, Quarterly Report of Attorney General, Volume XX, page 356, and opinion to Hon. Ernest L. McClure, supra.

Your question No. 3 reads as follows:

"3. When the jury roll is prepared, is it necessary that the name of each and every person appearing on the jury roll shall be placed on cards as prescribed by law and such cards placed in the jury box?"

This inquiry must be answered in the affirmative. The act is clear and unambiguous in this regard. Section 13 reads in pertinent part as follows:

"Section 13. **** The jury commission shall cause to be prepared plain white cards all of the same size and texture and shall have written or printed on the cards the name, occupation, place of residence and place of business of the person whose name has been placed on the jury roll *** ."

Also Section 14 reads in pertinent part as follows:

"Section 14. The Jury Commission shall place on the jury roll and in the jury box the names of all male citizens of the county **** (who are qualified and not exempt)."

From these excerpts it does not appear to admit of doubt but that all the names of the jury roll must be on cards as prescribed by law and placed in the jury box. **Bell v. Terry,** 213 Ala. 160, 104 So. 336. The court in this case reached the same conclusion under similar provisions of the former jury commission law, as it also did in the recent case of **Welch v. State,** 28 Ala. App. 273, 183 So. 879, cert. den. 236 Ala. 577, 183 So. 886.

Your question No. 4 reads as follows:

"4. When a special jury is drawn in a capital case, may the names of all special jurors drawn but who are not used in the case be replaced in the jury box before the next regular meeting of the jury commission or the next special meeting under Section 16 or Section 18?"

This inquiry must be answered in the negative. When a juror's name has been drawn from the jury box, there is no authority to place his name again in the box with the ones remaining therein, even though he was not used as a juror. **Jimmerson v. State,** 133 Ala. 18, 32 So. 141; **Wilkins v. State,** 112 Ala. 55, 21 So. 56, are cases holding this to be true under the former jury

commission or jury board acts. These cases are applicable today under the new act, since under the sections there considered, provision was made for refilling the jury box and no authority given to place a drawn name back in the box, regardless of whether or not the person was used as a juror, as is true under the 1939 act.

Your question No. 5 is as follows:

"5. Coffee County has two divisions requiring two separate jury rolls and jury boxes, one for the Enterprise Division and another for the Elba Division. Is it permissible for the jury commission to meet and fill the jury box in one division beginning on the first Monday in October each year and meet and fill the jury box in the other division beginning on the third Monday in October each year, or is it necessary for the commission to remain continuously in session, Sundays excepted, until the jury rolls are prepared and the jury boxes filled for both divisions.

In the case of **Wells v. State,** supra, the court held that the jury commission may meet to make up a new jury roll only at the times specified by statute. Since, therefore, this act requires the jury commission to meet on the first Monday in October in each year to make a new jury roll, I am of the opinion that you must make the jury roll at that time for both divisions of your county. It will be noted that Section 19 of the 1939 Act provides that the jury rolls and jury boxes for counties with two divisions shall be made up in the manner prescribed in the act. Except for extraordinary provisions for refilling the jury box, as provided for in Sections 16 and 18 of the act, there is no authority for the commission to meet to perform their duties except at the annual meeting beginning on the first Monday in October. Therefore, it appears that you must complete the making of the jury rolls and the filling of the jury boxes for the two divisions at the same annual meeting provided for in Section 13.

Your question No. 6 reads as follows:

"6. Does the jury commission have the right and authority to meet on the first Monday in October and adjourn from time to time until the jury roll is prepared and the jury box filled as prescribed by law, or is it necessary for the commission to remain in session until the work is completed?"

After carefully reading the whole act, I am of the opinion that the jury commission should remain in session from the first Monday in October until the jury roll has been made and the jury box filled. It will be noted that provision is made for substitution in the event a quorum of the commission is not available. (Section 6). Also it is provided that two members shall constitute a quorum. (Section 4). Although the act does not prohibit the commission from adjourning from time to time, it appears to me that the expediency desired, as shown by certain portions of the act, suggests that the commission remain in session until it has completed its work, except under some dire necessity where adjournment would be imperative.

Your question No. 7 is as follows:

"7. Is it permissible for the jury commission in meeting to prepare the jury roll and fill the jury box to revise the jury roll theretofore prepared by striking therefrom the names of persons known to be dead or who in the opinion of the commission do not possess the qualifications for jury service, and add the names of such additional persons as the commission may deem to possess the qualifications for jury duty, and as so revised adopt the same as the jury roll; or is it necessary that an out and out new jury roll be prepared each time the commission meets as provided by law?"

It is my opinion that the commission must make a new jury roll each time it meets to refill the jury box according to law. This question is discussed to some extent in my answer to question No. 1. Section 13 requires that the commission each year "make in a well bound book a roll," which must be arranged alphabetically and by precincts in their numerical order. Section 16 requires that the commission, when meeting extraordinarily as therein provided for "make and certify a new roll." The act provides that each year the commission must make a new roll and the procedure outlined in your inquiry does not appear to constitute the "making of a roll," or the "making of a new roll," but merely the correcting of a roll. Therefore, I am of the opinion that you must make "an out and out new jury roll" at the time prescribed by law. (See my answer to question No. 1.). However, I see no objection in using the old roll as a guide in the preparation of the new roll.

Your question No. 8 reads as follows:

"8. It is customary in some counties for courts requiring jurors to return to the jury commission the cards drawn from the jury box containing the names of jurors. When the commission meets to prepare a new jury roll and refill the jury box, is it permissible to use these same cards or is it necessary for the Clerk to prepare new cards containing the names and other necessary data with respect to such jurors?"

The courts of this state have said that when any card is drawn from the jury box in impanelling a jury that these cards should be destroyed. See the following cases, which are cited above: **Jimmerson v. State,** supra; **Wilkins v. State,** supra. Cf: **Davis vs. State,** 168 Ala. 53, 52 So. 939.

The Court in the Jimmerson case stated that from the facts appearing there, there was no error detrimental to the substantial rights of the defendant in returning the drawn cards to the jury box. Nevertheless, the Court stated, "it may be admitted, that the slips containing the names of the persons composing the three **venires** which were quashed on motion of the defendant at the former term of the court, — two of them for the trial of this defendant, and one of them for the trial of another defendant in a capital case, — should not have been restored to the jury box, after said **venires** were quashed, but should have been destroyed."

This statement of the Court is equally applicable under the 1939 Act. The premises considered, it is my opinion that the cards drawn from the jury box in the process of impanelling a jury should be destroyed and, therefore, they could not be used again.

Your question No. 9 reads as follows:

"9. Are the provisions of Section 17 of said Act requiring the Clerk of the commission to visit every precinct at least once a year to enable the jury commission to properly perform the duties required of it by said act mandatory, or is there a sufficient compliance with the law if the clerk and the jury commissioners contact outstanding and reputable citizens of each and every precinct in order to ascertain the names of persons possessing the requisite qualifications for jury duty. In other words the Clerk of the Coffee County jury commission may chance to see good and reputable men from Beat one in the Town of Elba and get from them information concerning who in Beat one are competent to serve as jurors, is it nevertheless necessary that the Clerk visit Beat one to comply with the provisions of Section 17 of the Act in this respect?"

This question must be answered in the affirmative. It is my opinon that the Clerk of the Jury Commission should visit every precinct at least once a year. Section 17 of the 1939 Act reads in pertinent part as follows:

"Section 17. **** The jury commission shall require the clerk of the commission to scan the registration lists, the lists returned to the tax assessor, any city directories, telephone directories, and any and every source of information from which he may obtain information, **and to visit every precinct at least once a year** to enable the jury commission to properly perform the duties required of it by this act **** ." (Emphasis supplied).

The term "shall require" is, in my opinion, mandatory on the commission. **Coleman v. Town of Eutaw,** 157 Ala. 327, 47 So. 703; **Francis vs. Superior Court,** Los Angeles, 43 P. 2d. 300, 3 Cal. 2d. 19; Cf: Opinion to J. Bruce Henderson on January 31, 1941, copy enclosed.

It will be noted that in addition to visiting each precinct at least once each year, the clerk must also scan "every other source of information." Therefore, it seems that even though the clerk has examined other sources of information, it is requisitory that he visit each precinct at least once each year.

Your question No. 10 reads as follows:

"10. Who is the proper custodian of the jury roll."

I am of the opinion that the jury commission is the proper custodian of the jury roll.

Section 13 of the Act reads in pertinent part as follows:

"Section 13. **** The jury roll shall be kept securely and for the use of the jury commission exclusively. It shall not be inspected by any one except the members of the commission or by the clerk of the commission upon the authority of the commission, unless under an order of the judge of the circuit court or other court of record having jurisdiction."

The 1931 Jury Board Act (Act No. 47, H, 70, approved February 20, 1931, page 55) was identical in this respect. In construing the 1931 act, this office held in an opinion to Hon. H. J. Rutherford, President, Jury Board of Russell County, under date of March 2, 1934, Biennial Report of Attorney General, 1932-1934, page 514, that:

> "In answer to your third question, I am of the opinion that the place where the jury roll shall be kept is within the discretion of the Jury Board of the County (sic). Section 13, supra, provides that the jury roll shall be kept securely and for the use of the Jury Board exclusively and that it shall not be inspected by anyone except the members of the Board or by the Clerk of the Board upon the authority of the Board unless under an order of the judge of the Circuit or other Court of record having jurisdiction. Of course, this provision makes it mandatory upon said Board to select a safe and secure place for the deposit of said jury roll."

It must be borne in mind that this opinion deals with your duties as a member of the Jury Commission of Coffee County. It is not to be construed as holding that if a Jury Commission fails to follow the conclusions reached in this opinion in every particular that the jury roll and jury boxes would be illegal.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 8, 1941.

Hon. Lamar Field,
Hon. R. B. Carr,
Circuit Judges, Calhoun County,
Anniston, Alabama.

Probation Act (Act No. 278, S. 198, approved August 24, 1939, General Acts, 1939, page 434) —

1. Probationer is not serving sentence while on probation in sense that he is entitled to be credited with time that intervenes between date of order granting probation and date of order revoking order of probation.

2. Courts have power and authority to determine length of period of probation. Period of probation not limited to length of sentence imposed.

3. Where a defendant has been placed on probation on condition that he pay fine and costs periodically (among other conditions) and after paying part of the fine and costs the order of probation is revoked, he is entitled to credit for the amount of fine and costs paid prior to revocation.

4. Court has authority as a condition of probation to require reparation to the injured party.

5. A defendant who pleads guilty under the provisions of Act No. 227, H. 417, approved August 16, 1939 (General Acts, 1939, page 367), is entitled to benefits of probation.

Opinion by the Attorney General.

Dear Sirs:

I am in receipt of two requests for official opinions from you. One is dated December 6, 1940, and requests my opinion on eight different questions. The other request for opinion is dated January 9, 1941, and requests my opinion on only one proposition.

I have decided to answer your requests in one opinion, giving to the question presented in your request of January 9 the number 9, and considering it as if it were incorporated in your request of December 6, 1940.

The first question you ask is as follows:

"1. Does the ruling in the Pinkerton Case have any application to the probation statute?

"As we construe the opinion and statute, the opinion does not in any way affect the provisions of the probation statute, for the reason that the probation statute confers upon Trial Judges the right to suspend the execution of sentences for the purpose of placing parties on probation, and the opinion in the Pinkerton Case is worked out on the theory that there is not any suspension of sentence, and when a convict serves a portion of his sentence within the prison walls and, as stated by the court, 'a part thereof within the terms of the parole,' he cannot be held in prison beyond the term of his maximum sentence.

"The probation statute provides that the court 'may suspend execution of sentence and place on probation any person convicted of crime in any court exercising criminal jurisdiction. The court shall have no power to suspend the execution of sentence imposed on any person who has been found guilty and whose punishment is fixed at **** imprisonment in the penitentiary for more than ten years.' This language is found in Section 1 of the Act.

"Section 3 provides that 'after conviction, the court may continue the case for such time as may be reasonably necessary to enable the probation officer to make his investigation and report.'

"Section 6 provides that 'the period of probation or suspension of execution of sentence shall be determined by the court and such period amy be continued or extended.' This section also provides that after the arrest of a probationer, 'such probation officer shall **** submit in writing

a report showing in what manner a probationer has violated probation. Thereupon the court, after a hearing, may revoke the probation or suspension of execution of sentence and shall proceed to deal with the case as if there had been no probation or suspension of execution of sentence'."

I do not think that the Pinkerton case has any application to the operation of Act No. 278, S. 198, approved August 24, 1939 (General Acts, 1939, page 434), generally referred to as the Probation Statute.

The Pinkerton case to which you refer is the case of **Pinkerton v. State,** 198 So. 157. In this case, it appears that Pinkerton was convicted in 1936 but did not begin serving his sentence until March 4, 1938. On March 7, 1938, he was granted a parole by the then Governor of Alabama. He returned to his home where he remained at large until February 13, 1940, when he was arrested, charged with violating the terms of his parole. Subsequent to his release from prison, the Legislature of this state passed the so-called Probation Act.

Pinkerton, after his arrest in February, 1940, sought his release by writ of habeas corpus, alleging, (1) that the newly created Board of Pardons and Paroles had no authority over persons who had been paroled by the Governor of Alabama prior to the creation of said Board and, (2) that even if the Board would have jurisdiction over such parolees as a class, that it did not have jurisdiction over the petitioner because of the fact that the time which petitioner served in prison, together with the time which elapsed subsequent to his release from prison and prior to the date of his arrest for violating the terms of his parole, exceeded the length of the sentence originally imposed upon him. To express it differently, the petitioner claimed that a parolee, subsequent to the date that the Pardon and Parole Act went into effect, receives credit for serving his sentence outside of the prison walls.

The Court ruled against Pinkerton on his first proposition, but held with him on the second.

Judge Simpson, in writing for the Court of Appeals, said as follows:

"First. As to all prisoners heretofore, nor or hereafter released upon parole, the Board of Pardons and Paroles has the same, and like, authority and jurisdiction, which, as we construe the act creating it, is complete and exclusive, until the convict shall have served the maximum sentence imposed upon him (or unless sooner pardoned).

"Second. From and after the approval of the act creating the Board of Pardons and Paroles, a convict, while on parole, 'outside the prison walls,' is executing his sentence, just as if he were inside of prison walls — 'until the expiration of the maximum term specified in his sentence' (or, of course, unless there should be prior revocation of said parole or unless sooner pardoned.)"

It is, of course, obvious that the Court of Appeals in the Pinkerton case was not at all concerned with the Probation Statute and, therefore, it cannot be said that the Pinkerton case expressly applies to matters arising under the terms of the Probation Statute.

It might be contended, however, that the reasoning applied in the Pinkerton case is likewise applicable to persons placed on probation. I do not think this is true, however, for the reason that the Court of Appeals, in its opinion, clearly indicates that the conclusion therein reached is based on the language of Section 7 of the Pardon and Parole Act (Act No. 275, S. 186, approved August 25, 1939, General Acts, 1939, page 426), the pertinent part of which section is as follows:

> "Section 7. **** If the Board shall so determine, such prisoner shall be allowed to go upon parole **outside of prison walls** and enclosure upon such terms and conditions as the Board shall prescribe, **but to remain while thus on parole in the legal custody of the warden of the prison from which he is paroled until the expiration of the maximum term specified in his sentence,** or until he is fully pardoned in the manner hereinafter provided." (Emphasis supplied)

Your second question is as follows:

> "2. Is there any limit as to time during which a defendant may be placed on probation in felony cases or misdemeanor cases? Suppose in a distilling case, in which the punishment is one to five years in the State Penitentiary, the sentence is for a year and a day, would probation be limited to the period of a year and a day, or the five-year period, or the period of ten years, which is the maximum length of a sentence in which trial courts can grant probation; and, if probation be not limited to any one of these three periods, what would be the time limit for probation; and could it be extended for the period of the natural life of the convict?"

I am of the opinion that there is no limit as to the time during which a convict may be placed on probation in felony cases or in misdemeanor cases. I call your attention to the following provisions of the Probation Act, supra:

> "Section 4. The court shall determine and may at any time modify the conditions of probation **** ."

> "Section 6. The period of probation or suspension of execution of sentence shall be determined by the Court and such period may be continued or extended. Upon the satisfactory fulfillment of the conditions of probation or suspension of sentence the court shall, by order duly entered on its minutes, discharge the defendant. **** "

I am aware of the fact that the Federal courts may only suspend the imposition or execution of sentence and place the defendant upon probation for a period, including extensions, not exceeding five years. This limitation, however, is expressly included in Section 724 of the Federal Probation Act (March 4, 1925, C. 521, 43 Stat. 1259; U. S. C. A., Title 18, Sections 724-727.

I also call your attention to the fact that the Probation Act passed July 14, 1931 (General Acts, 1939, page 443), as amended September 28, 1932 (General Acts, 1932, Extra Session, page 54), which act was subsequently declared unconstitutional in the case of **Ellis Montgomery v. State,** 231 Ala. 41, 163 So. 377, also contained a limitation as to the period of probation.

It is my opinion that the language of Sections 4 and 6 of the present Probation Act hereinabove quoted shows a legislative intent to vest in the court the power and authority to determine the length of probation. I think this is evidenced by the fact that in most other respects the Federal act and the present Probation Act are similar.

I am of the opinion, therefore, that the court may, at any time before the defendant actually begins to serve the sentence imposed upon him, fix such period and conditions of probation as it sees fit, and may thereafter extend, modify and continue such period and conditions.

Your third inquiry is as follows:

> "3. If one be sentenced for two years in the State Penitentiary and should lapse into criminal ways after the expiration of eighteen months and his probation should be revoked, would he have to serve the full two years, or only six months?
>
> "At the time of revoking the probation, could a court legally sentence the convict for less than a year and a day when he has been on probation for eighteen months on a two-year sentence?"

I construe the above to present the question: "Is a defendant whose execution of sentence has been suspended and who is placed on probation entitled to receive credit for the time which elapses between the date on which he is placed on probation and the date on which the order of probation may be revoked?" It is my opinion that a defendant is not entitled to any credit on the sentence originally imposed upon him under such circumstances.

Here again it might be well to consider the case of **Pinkerton v. State,** supra, but I again call your attention to the fact that the decision in that case rested on the language of Section 7 of the Pardon and Parole Act, which language the Court held clearly demonstrated a legislative intent to allow a parolee to serve his sentence outside of prison walls.

There is absolutely no such language in the Probation Act and there is nothing to indicate that the Legislature intended for such to be the case.

I refer you to the case of **Fuller v. State,** 122 Ala. 32, 26 So. 146, which case was decided on June 1, 1899. In that case the Course had under consideration a petition for writ of habeas corpus filed by one Brooks Fuller, who had previously been paroled by the Governor pending good behavior, under the provisions of Sections 5461-5463 of the Code of 1896, and who had been arrested charged with violating the conditions of his parole. In seeking his release, Fuller contended that he was not subject to arrest for violating the terms of his parole because of the fact that he was entitled to credit for the time which had elapsed since his parole and the date of his arrest and, being so entitled, that he had completely served the sentence for which he was originally incarcerated.

Mr. Justice McClellan, in writing to the question, said as follows:

"The parole does not in any way displace or abridge the sentence. It merely stops the execution for a time only. It suspends, not destroys. The suspension is like that which occurs constantly in the administration of criminal laws where the defendant appeals from the judgment of conviction. The execution of the sentence is by the appeal superseded and postponed pending the appeal, and, if the judgment is affirmed, the execution of the sentence thereupon begins, and continues for the period set down originally in the judgment. **** This is the plain meaning of the statute, and so interpreted, shall involve, of necessary consequence, the proposition that upon condition broken, even after the time at which the sentence would have ended, but for its suspension, the convict may still be remanded to custody, that the unserved, and hence unexpired, part of the sentence — that part which he was released from during the period of durance originally specified — may be executed upon him. So the law is written."

I do not believe that the defendant can be heard to complain because of this conclusion. It must be borne in mind that the person being dealt with has been seized in a constitutional way, been confronted by his accuser and the witnesses against him, been tried by a jury of his peers, secured to him by the Constitution, and by them been convicted of crime, been sentenced to punishment therefor and has, of his own volition, requested the benefits of probation.

It is my opinion that the reasoning applied by the Supreme Court in the case of **Fuller v. State**, supra, is likewise applicable to the case of a defendant who has been placed on probation. Of course, the Fuller case would not be authority for this conclusion if the Probation Act, supra, contained language similar to that of Section 7 of the Pardon and Parole Act, supra.

Your question No. 4 is as follows:

"4. Let us suppose a misdemeanor case in which a fine of $25.00 has been imposed, and the costs amount to $95.00, a total of $120.00, the hard labor for the fine and costs amounting to 147 days, or about five months; suppose, also that the defendant can only pay $5.00 per month, which would require two years for the payment of the fine and costs, could the probation period be extended over two years and, if so, if it should be revoked, what would be the status of the convict as to his rights to recover back the money which had been deposited with the Clerk on his fine and costs?"

It is my opinion that the probation period could be extended over such period of time as the court deems proper. I do not believe that the convict would be entitled to recover the partial payment which he has made to the clerk on his fine and costs. Of course, if the order of probation is revoked, he is then called upon to either pay the fine and costs or be sentenced to hard labor therefor. If he desires to pay, he should be given credit for the partial payment already made and if he is sentenced to hard labor in lieu of the payment of fine and costs, he should be given credit for the amount previously paid to the clerk.

Your question No. 5 is as follows:

"5. Suppose in the last case referred to property had been stolen of the value of $25.00 and could not be returned, would the court have the legal authority to place a fine of $25.00 on the defendant, with the stipulation that the sum should be paid to the injured party for the purpose of reimbursing him, or would such fine have to go into the Fine and Forfeiture Fund of the county?"

Under the terms of Section 4 of the Probation Act, supra, the court exercises a broad discretion and may require the defendant as a condition of probation **either** to pay the fine imposed, and costs, or such portions thereof as the court may determine, and in such installments as the court may direct, **or** make reparation or restoration to the aggrieved party, etc.

It is my opinion, therefore, that the court may suspend the execution of the sentence by requiring the defendant to make reparation to the aggrieved party. Technically speaking, if the court requires the payment of the fine, it is my opinion that such payment should be covered into the fine and forfeiture fund of the county (under the general statutes). Of course, the same end could be reached by suspending the payment of the fine altogether and requiring reparation.

Your sixth inquiry is as follows:

"6. Under the provision, to the effect that the court may continue a case for investigation by the probation officer, certain statutes requiring the court to sentence a defendant at the time of his conviction, if the report should be delayed for a period of thirty days and the defendant sentenced for a year and a day, would the thirty days come off of the period of a year and a day, and would the court have authority to keep in effect the defendant's bond, if he were under bond?"

I am of the opinion that if, after conviction, the case is continued pending receipt of the probation officer's report (within a reasonable time), the intervening time up to imposition of sentence is not part of the sentence. In such case, defendant's bond will remain in effect should the court so order. If, on the other hand, the court, immediately upon conviction, pronounces sentence, and defendant thereupon applies for probation, sentence should be concurrently suspended pending receipt of the probation officer's report and in that event the sentence would not begin to run until the probation or suspension of sentence was revoked. I call your attention to an opinion of this office rendered September 13, 1940, to Mrs. Edwina Mitchell, Associate Member, Board of Pardons and Paroles, a copy of which I am herewith enclosing. This opinion is reported in Quarterly Reports of Attorney General, Volume XX, page 274.

Your question No. 7 is as follows:

"7. If a sentence be fixed at the term of a year and a day, could it, at the end of that time, be extended from time to time so as to cause it to run indefinitely, under the clause which confers upon the court the right to continue or extend the period of probation?"

It is my opinion that if a sentence is imposed of a year and a day and thereupon suspended and probation granted, the court may at any time before expiration of that time, revoke the probation and order execution of the sentence, or further extend the term of probation after due hearing as provided by the act. This is in accord with the plain words of the statute itself imposing no limitation upon the term of probation, the power to modify or extend the same or the power to revoke the same. In this respect, the Probation Act differs radically from the Pardon and Parole Act, which expressly limits the jurisdiction of the Board of Pardons and Paroles to the term of sentence imposed upon the parolee. **Pinkerton v. State,** supra.

Your question No. 8 is as follows:

"8. After hearing, subsequent to an arrest looking to a revocation of probation, is it sufficient as to such hearing to hear the report of the probation officer, or must the matter be set down for a certain day and the defendant given notice, with the opportunity to be present and have witnesses summoned in his behalf?"

It is to be noted that the statute does not define or otherwise indicate the nature of the hearing to which the probationer is enitled before revocation of probation. It is my opinion that it is a matter of discretion on the part of the court as to the kind of hearing which will be given the probationer. It is my opinion, however, that the spirit of the statute would best be complied with by giving to the defendant an opportunity to apprise the court of his answer to or explanation of the charges which have been made against him. Quarterly Reports of Attorney General, Volume XVIII, page 16.

Your question No. 9 is as follows:

"Paragraph (c), Acts of Alabama (1939), 367, makes provision 'to dispense with an indictment by a Grand Jury,' etc.

"This Act provides that on a plea of guilty the court 'shall thereupon receive and enter the plea of guilty of said defendant and shall enter judgment of conviction thereon and sentence said defendant to such term in the penitentiary as is prescribed by law, any other provision of the law to the contrary notwithstanding.' This provision is found in Section 5 of the Act.

"Section 7 reads as follows: 'After the court has heard and considered the plea of guilty of the defendant and has permitted the filing of such plea and sentenced the defendant, such defendant shall not have the right of appeal from the section of the court.

"We wish to have an opinion on whether in cases involving a plea of guilty under this statute the defendant is entitled to the benefits of the probation law."

Act No. 227, H. 417, approved August 16, 1939 (General Acts, 1939, page 367) was passed to carry into effect that provision of Section 8 of the Alabama Constitution of 1901, as amended by the constitutional amendment pro-

posed March 29, 1939 (Act No. 7, S. 9, passed March 29, 1939, General Acts, 1939, Special Session, page 6), whereby:

> " **** in all felony cases, except those punishable by capital punishment, the legislature may by law dispense with a grand jury and authorize the prosecutions and proceedings in such manner as may be provided by law, if the defendant after having had the advice of counsel **** makes known in open court **** that he desires to plead guilty," etc.

It is to be noted that Act No. 227 was enacted on August 16, 1939. Therefore, the portion of Section 5 thereof quoted in your letter of inquiry to the effect that "the court **** shall enter judgment of conviction thereon and sentence said defendant to such term in the penitentiary as is prescribed by law, **any other provision of the law to the contrary notwithstanding,**" can have no applicability to Act No. 278, S. 198, approved August 24, 1939 (General Acts, 1939, page 434) for, as is apparent, this act was enacted subsequent to said Act No. 227. Especially is this conclusion true in the light of the following excerpt from Section 1 of Act No. 278:

> "Except in the case hereinabove provided, Circuit Courts or inferior courts from which an appeal lies directly to the Court of Appeals or Supreme Court, **after a plea of guilty,** or after the return of a verdict of guilty by the court may suspend execution of sentence and place the defendant on probation, or may (sic) impose a fine within the limits fixed by law and also place the defendant on probation." (Emphasis supplied)

Nor can the provision of Section 7 of Act No. 227, supra, quoted by you, impel a different conclusion.

No reason is perceived why a defendant adjudged guilty and sentenced pursuant to the provisions of said Act No. 227, supra, occupies a status different from that of other defendants, or should not, once legally and duly convicted and sentenced, be accorded by the court the same treatment as other defendants in the matter of probation and suspension of execution of sentence, as provided by Act No. 278, S. 198, approved August 24, 1939 (General Acts, 1939, page 434).

It seems only logical to conclude that all persons convicted and sentenced, whether without indictment or after indictment, should be treated alike with respect to probation and suspension of sentence, provided, of course, they come within the terms of the Probation Act, supra. No valid distinction between the two classes of convicts can be found, so far as I can see, or any reason advanced why one class should be handled differently from the other.

For further discussion of the act now considered, No. 227, supra, see Quarterly Reports of Attorney General, Volume XVII, page 332 and Quarterly Reports of Attorney General, Volume XVIII, page 191.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 10, 1941.

Hon. J. W. Sharpton, President,
Etowah County Board of Revenue,
Gadsden, Alabama.

Counties — Labor Unions —

The Etowah County Board of Revenue may not legally enter into a contract or agreement with a labor organization or union recognizing such union as a bargaining agent for county employee members of said union and agreeing as to hours and employment, wages, vacations with pay, and holidays with pay for county employee members of said union.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of March 3, 1941, is as follows:

"The Etowah County Board of Revenue is desirous of obtaining a legal opinion from your office on the following question:

" 'Can the Etowah County Board of Revenue legally enter into a contract or agreement with a labor organization or union, recognizing said union as bargaining agent for county employee members of said union and agreeing as to hours of employment, wages, vacation with pay, and holidays with pay for county employees of said union?' "

It is my opinion that your inquiry must be answered negatively.

In reaching this conclusion, I have not failed to recognize the fact that the county employees have a legitimate interest in collective action for the purpose of improving their economic and social situation wherever change is needed. I think it cannot be seriously questioned by anyone that beneficial results to society, as well as to employees individually and as a class, have come from an assertion of the collective economic force of employees. The beneficial results of cooperative action on the part of labor generally is apparent. But the question raised by your inquiry does not involve the power or authority of the employee class. Solely presented is the right of a county, a mere political subdivision of the State (**First National Bank v. Jackson County**, 227 Ala. 448, 150 So. 690; **Pickens County v. Williams**, 229, Ala. 250, 156 So. 548; **Moore v. Walker County**, 236 Ala. 688, 185 So. 175) — an agency of limited jurisdiction having only those powers expressly authorized by statute or necessarily implied therefrom (**Corning v. Patton**, 236 Ala. 354, 182 So. 39) — to enter into a contract, the ultimate effect of which might be to remove the control of the government from the people as a whole, acting through their duly constituted officials.

I have found no specific authorization for such a contract, nor has there come to my attention a provision of law from which the right to enter such an agreement might be necessarily implied. On the contrary, I have found,

and I respectfully direct to your attention, House Joint Resolution No. 142, approved July 10, 1940, (General Acts, 1939, page 1004) which is as follows:

"WHEREAS, it has come to the attention of the Alabama Legislature through the press of this State that efforts are being made to organize the employees of this State into a union, same to be affiliated with either the A. F. L. or the C. I. O., and

"WHEREAS, the right to organize carries with it the right to strike which right, if exercised by the organization of State employees mentioned would result in chaos and take from the servants of this State elected by the people the right and power to manage the State's affairs and transfer same to the officials of the A. F. L. and the C. I. O., and

"WHEREAS, even the thought of such possibility is repugnant to every sense of democracy, therefore,

"BE IT RESOLVED by this Legislature, the Senate concurring, that the effort to organize State employees supported by the taxpayers' money, — Jew, Catholic and Protestant alike is viewed with grave concern and disfavor by this Legislature.

"BE IT FURTHER RESOLVED that copies of this resolution be given to the Governor of this State and to the press of this State in order that its citizenship may know that the spirit of Democracy still lives in this the first State on the alphabetical list of states of the Union — that spirit now threatened with extinction both in America and throughout the world."

The foregoing resolution is an indication of the public policy of this state, expressed by the elected representatives of its people. I am constrained to hold, therefore, that a contract contrary to this expressed public policy would be unauthorized. The fact that the resolution speaks of "employees of this state," cannot affect the conclusion hereinabove reached, for the reason that, as above noted, a county is but a mere political subdivision of the state.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 10, 1941.

Hon. Robert M. Hill, Associate Member,
State Board of Pardons and Paroles,
Montgomery, Alabama.

Pardons, Paroles and Probation — escapes — Officers' Fees for Returning —

1. Where a felon is placed on probation, which probation is later revoked, and felon is found to have escaped to another state, the

rules applicable generally to the return of persons charged with crime, including the fees of officers making the return, are applicable.

2. Circuit courts, after affirmance or dismissal of a cause by the appellate courts of Alabama, do not lose jurisdiction to suspend sentence and grant probation to a defendant, even though he fails to surrender to the sheriff within the fifteen day period after such affirmance or dismissal, as provided by Section 3245, Code of Alabama, 1923.

Opinion by the Attorney General.

Dear Sir:

I have two requests for official opinions from you concerning probation matters. In this opinion I am answering both requests.

Your letter of March 10, 1941, is as follows:

"We respectfully ask your official opinion on whether an arrest fee and expense money can be allowed the sheriff for arresting and returning a felon placed on probation on whom probation has been revoked by the trial judge and who has escaped or left the jurisdiction of the State of Alabama.

"We are mindful of your opinion of November 5, 1940, advising Mr. Singleton that arrest fee cannot be allowed in cases of probation violators. That dealt with those probationers remaining in the state.

"Since the case we here present is that of a felon escaped from the state, we were of the opinion you might rule affirmatively after considering the extradition act and the fact there is a fund set aside for returning escaped felons."

It is my opinion that the provisions of law governing the expenses of returning persons charged with crime in this State are equally applicable to probationers who have escaped or left the jurisdiction of the State of Alabama. The statutes which govern the returning to this State of escaped felons are Section 3742 of the Code of Alabama, 1923 (providing for the returning to this State of a criminal without requisition, and the fees of the sheriff in such circumstances), and Sections 22 and 23 of Act No. 482, H. 391, approved July 22, 1931 (General Acts, 1931, pages 559, 563, 564), the Uniform Criminal Extradition Act, relative to the returning of fugitives from this State where extradition is necessary.

It will be noted that all of these provisions relate to the return to this State of persons "charged with crime" in this State.

In 22 Am. Jur. 264, Section 25, the following rules are stated by the text writer:

"A convicted person whose parole has been revoked because of a violation of a condition that he not leave the state without the permission of the parole officer is subject to extradition as a fugitive from justice. This general rule prevails even though the paroled prisoner is permitted to leave the paroling state, if the prisoner goes to a state not authorized by the parole; and the same is true if the paroled prisoner goes to the state authorized but there violates some term of his parole. The paroled prisoner is declared to be a fugitive from justice on the ground that he is a convict whose time has not expired and who, therefore, is charged with crime under the United States Constitution."

The subject is annotated at length in 78 A. L. R. 422. Among the cases cited in the A. L. R. annotation is that of **Hughes v. Pflanz**, 138 Fed. 980. In this case a writ of habeas corpus was sought on the ground that the person detained for extradition in breaking his parole, had not committed any crime under the laws of the demanding state, and was not there charged with a crime of any kind for which he could be arrested and further punished, but only with the conviction of a crime. The court answered this contention, stating:

"The term 'charged with crime' as used in the Constitution and statute seems to us to have been used in its broad sense, and to include all persons accused of crime. It would be a very narrow and technical construction to hold that after the accusation, and before conviction, a person could be extradicted, and while after conviction, which establishes the charge conclusively, he could escape extradition. The object of the provisions of the Constitution and statute is to prevent the escape of persons charged with crime, whether convicted or unconvicted, and to secure their return and punishment if guilty. Taking the broad definition of 'charged with crime' as including the responsibility for crime, the charge would not cease or be merged in the conviction, but would stand until the judgment is satisfied. It would include every person accused, until he should be acquitted, or until the judgment inflicted should be satisfied. Any other construction would prevent the return of escaped convicts upon the charge under which they had been sentenced, and defeat in many instances the ends of justice. The relator was convicted of the crime of larceny in Indiana, and sentenced, and the term of sentence has not yet expired. That charge of larceny continues to be a charge against him until the sentence has been performed, and he therefore stands 'charged with crime,' within the meaning of that term as used in the Federal Constitution."

Applying to your inquiry regarding the fees and expenses allowed a sheriff for arresting and returning a felon placed on probation, on whom probation has been revoked by the trial judge, and who has escaped or left the jurisdiction of the State of Alabama, the rules applicable generally to the returning of persons charged with crime in this State, you are advised as follows:

The sheriff is not entitled to an arrest fee. The law of costs and fees has been uniformly held to be a penal law, and no fees can be taken but in cases expressly provided by law. **Troup v. Morgan County**, 109 Ala. 162, 19 So. 503. And see Section 3734 of the Code of Alabama, 1923. I find no provision of law, or reasonable implication therefrom, which would indicate a legislative intention to provide an arrest fee for the sheriff in such cases. Cf. Quarterly Report of Attorney General, Volume XXI, page 140.

Where the punishment of the crime for which the escaped probationer was convicted was by confinement of such probationer in the penitentiary, the expenses allowed the sheriff or other officer returning him, if return is had under the provisions of the Uniform Criminal Extradition Act, supra, should be paid from the State Treasury on the certificate of the Governor and warrant of the Comptroller, in accordance with Section 24 of said Act. In all other cases they should be paid out of the county treasury of the county wherein the crime for which the probationer was convicted is alleged to have been committed. This, also, is in accord with Section 24 of said Act. Quarterly Report of Attorney General, Volume I, page 159.

In those cases where no requisition is necessary, the escaped probationer or parolee returning without the necessity for extradition, the expense incurred by the returning officer are governed by Section 3742 of the Code of Alabama, 1923. This office has held with respect to proceedings under this Section that the State pays for the removal of a prisoner from another state, who is returned without requisition, only when the party returned is charged with, and convicted of, a felony. Biennial Report of Attorney General, 1934-1936, page 561; Quarterly Report of Attorney General, Volume II, page 231; Quarterly Report of Attorney General, Volume XIV, page 247.

Of consequence, where probationer sought to be returned was convicted of a felony, the State will pay the expenses of the return. In other cases, the returning officer is not entitled to receive his expenses from the State.

For a discussion of the fees of the returning officer where the governor of the state in which the fugitive is located refuses to return the criminal, see Quarterly Report of Attorney General, Volume XVII, page 369.

Your letter of January 7, 1941, is as follows:

"In re: Probation Act.

"In your opinion of June 12, 1940, construing the 1939 Probation Act you ruled as follows:

> "'3. Circuit Court, after affirmance or dismissal, has authority and jurisdiction to entertain and act upon application for suspension of sentence and for probation in case in which the defendant appeals to the appellate courts of Alabama and the appeal is affirmed or dismissed, if such application is made before the beginning of the execution of the sentence imposed under the judgment appealed from.'

'Does this mean that probation application can be entertained and the subject put on probation by the trial court at any time before he actually enters upon service of the sentence by incarceration?

"Or does it mean that application must be made and acted upon while there is a modicum of jurisdiction remaining in the trial court and does that 'some degree' of jurisdiction end at the termination of the fifteen day period after the appellate courts have finally disposed of the case and the subject must have surrendered to the sheriff for the service of his sentence?

"Could it be that the 'execution of the sentence' has constructively begun at the end of the fifteen day period though the defendant has not surrendered on the theory that the defendant should be classed as a fugitive from justice or as an escape?

"We are led to ask that clarification of the former opinion because the opinion speaks in several cases of the right to grant probation as long as 'some degree of jurisdiction' or 'a modicum of jurisdiction' remains in the trial court.

"We are asked now to advise a certain judge whether probation power exists in a case disposed of by the appellate courts approximately nine months ago, the defendant's bond has been forfeited and he has been at large since.

"We would appreciate it if you will send copy of your opinion clarifying this matter to each of the circuit judges of the state."

It is my opinion that the circuit court has the authority to place a defendant on probation at any time prior to the date on which the defendant begins the execution of his sentence. I think this is true even in a case where a defendant has taken his case to an appellate court and after affirmance by that court, the defendant fails to report to the sheriff within fifteen days, as is provided in Section 3245, Code of Alabama, 1923, which section is as follows:

"Section 3245. Effect of undertaking when appeal not sustained. — When the defendant in a case of misdemeanor or felony is sentenced to hard labor or imprisonment, or to the penitentiary, and gives bail pending the appeal, and the judgment of conviction is affirmed or the appeal is dismissed, he is bound by the undertaking of bail to surrender himself to the sheriff, at the county jail, within fifteen days from the date of such affirmance or dismissal; and if he shall fail to do so, the sheriff must indorse the bail bond forfeited and a writ of arrest must be issued by the clerk, and if not executed another must be issued, and so on until the judgment has been executed. If the defendant is taken on such writ, or if he shall surrender himself to the sheriff, the sentence must, without delay, be carried out as if no appeal had been taken."

This conclusion is based on the opinion rendered to you on June 12, 1940 (Quarterly Report of Attorney General, Volume XIX, page 258).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 15, 1941.

Miss Louise Tribble, Register,
DeKalb County Circuit Court in Equity,
Fort Payne, Alabama.

Register's Commissions —

The Register is not entitled to commissions on money paid on a monied decree where the money never came into his hands and was not the proceeds of a sale under process issued on decree.

Opinion by Assistant Attorney General Callahan.

Dear Madam:

Your request for official opinion bearing date of March 19, 1941, is as follows:

"I would like to have your opinion as to what commission registers are due in a case as follows:

"A decree of the Court provides that the defendant pay to the register (for the complainant) the sum of one thousand dollars and cost within thirty days from date of the decree and if same is not paid during that time, that the register advertise and sell the property set out in the decree. At the expiration of the thirty days the attorney for the complainant requests the register not to sell the property as ordered by the Court. At a later date the defendant pays to the attorney representing the complainant the amount due under the decree before any sale was advertised or made."

Under the circumstances stated in your request, we are impelled to answer that you are entitled to no commissions.

We call your attention to the following provisions of law:

"Clerks, sheriffs, and other officers in this chapter named are entitled to receive, for the services therein mentioned, the fees to such services respectively annexed, and no more; *** " (Code of Alabama, 1923, Section 7276).

The fees for services of the Register referred to by this Section of the Code are cataloged in Section 7283 of the Code of Alabama, 1923. Nowhere do we find any allowance for commissions or fees for money never coming into the hands of the Register and not the proceeds of a sale under process. Section 7283 of the Code of Alabama, 1923, names the services for which fees are allowed, and Section 7276 says no others can be charged or attached.

This opinion is confined to commissions in the case state, and has no reference to other fees that you may have earned in this case.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 16, 1941.

Hon. Albert W. Gill,
Director of Conservation,
Capitol.

Conservation Department — Pea River Project —

The State of Alabama may grant permission to a bus line or a taxicab service to go to and come from the recreational center located in the Pea River Project.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of April 4, 1941, follows:

"On May 16, 1939, the State of Alabama entered into a license agreement with the Federal Government whereby the State assumed control of that certain area of land in Dale and Coffee Counties known as the Pea River Project. I quote part of paragraph D of Section II of the license agreement as follows:

"'The State shall operate, maintain and administer the existing and subsequently developed recreational facilities for the use and benefit of the general public . . . . any recreational facilities that may be subsequently developed shall be consistent with the other uses of the land.'

"I quote Section VII of the agreement as follows:

"'The State shall not use or permit the use or occupancy of said property or any portion thereof inconsistent or incompatible with the purposes set forth in Section II.' (Quoted above)

"The property in question has been turned over to the Department of Conservation for management. There has been a request made by citizens of Ozark, Alabama, which is only 6 miles from the recreational center of the Pea River Project, for a permit to operate a bus line or taxi cab service from Ozark to the recreational center of the Pea River Project

assuming, of course, that a permit could be obtained from the Alabama Public Service Commission.

"Please let me have an official opinion regarding the legality of such a permit. Your usual prompt attention in handling such matters will be appreciated."

The question presented in the above request is whether or not the state by granting a permit to run a bus line or a taxicab service to the recreational center of the Pea River Project would be permitting a use of said property which is inconsistent or incompatible with the purposes for which this property was developed by the Federal Government.

It appears from paragraph D of Section 2 of the lease agreement entered into between the State of Alabama and the Federal Government, that the maintenance and administration of the developed recreational facilities, to be used for the benefit of the general public, was turned over to the State of Alabama. The only restriction placed upon the use of this property is found in Section 7 of the lease agreement, wherein it is provided that no use or occupancy of this property shall be permitted which is inconsistent or incompatible with the purposes set out in Section 2 — the purpose being that the property shall be used as a recreational center for the general public. It is a matter of common knowledge that before the general public can use this property for the purposes set out in Section of the lease agreement, it must have some means of ingress and egress to and from the recreational center. I do not believe that the state by allowing a bus line or taxicab service to furnish this means of transportation would be permitting a use or occupancy of this property which is inconsistent or incompatible with the purposes set out in Section 2 of the lease agreement. On the contrary, it would be consistent and compatible with the designated use of this property in that it would furnish a convenient and economical means whereby the general public could travel to and from the recreational center.

You are, therefore, advised that in my opinion, under the terms of the lease agreement entered into between the State of Alabama and Federal Government, the state may grant permission to a bus line or a taxicab service to operate its vehicles to and from the recreational center located on the project.

Nothing in this opinion is to be taken as being a limitation in any sense of the word upon the rights, powers and duties of the Public Service Commission.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 16, 1941.

Hon. H. J. Brogden,
Judge of Probate,
Covington County,
Andalusia, Alabama.

Tax Sales — Tax Deeds — Revenue Act, 1935, Section 241 —

Where purchaser of land sold for taxes died intestate before expiration of the three-year period for redemption, without assigning the Tax Collector's certificate of purchase issued to him upon purchase of such land and there has been no administration on the estate of said deceased purchaser, the Judge of Probate is not authorized under Section 241 of the 1935 Revenue Act (Gen. Acts, 1935, pp. 256, 360) upon production and surrender of such unassigned certificate of purchase by the purchaser's widow to execute and deliver a tax deed to her or to the heirs or distributees of the decedent.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of April 4, 1941, follows:

"On the 28th day of June, 1937, Mrs. W. R. Jones' property here sold for State and County tax and J. Hundley Jones bought said property at tax sale and secured a certificate of purchase from the Tax Collector at that time. About a year and a half later J. Hundley Jones died leaving a widow and no children except an adopted child. The widow has continued to pay tax on this property until the three years is out since the tax sale and is now asking for a tax deed to said property. She has the certificate of sale in her possession that was issued to her husband but it was never transferred to her. She is continuing to pay the tax on the property described in the certificate of sale held by her husband which is all the property they have any interest in except their home.

"J. Hundley Jones did not leave any will. There has not been any administration and will not be unless it is absolutely necessary.

"Please advise me if I can make a tax deed to this property, if so, to whom?"

Section 241 of the Revenue Act of 1935 (Gen. Acts, 1935, pages 256-360) requires the judge of probate upon return or surrender to himself of a certificate issued to a purchaser of property sold for taxes and payment of a fee of $1 after expiration of three years from the date of sale to execute and deliver to the purchaser "or person to whom the certificate of purchase has been assigned" a deed conveying such right, title, interest or estate as was vested in the delinquent taxpayer whose property has been sold.

This statute is silent as to the duty of the judge of probate in cases where the purchaser has died and has not assigned the certificate of purchase prior to his death, before the expiration of the three-year period allowed for redemption. This office has held that the duty of the judge of probate in this respect is ministerial merely; that is to say, that he has no power or authority to adjudicate or determine the equities under the circumstances last above stated. It is also held that a probate judge is not authorized to execute such a deed to the heirs of the purchaser without surrender of the certificate of purchase.

See the opinions of the Attorney General as follows: Opinion dated September 3, 1940 to Hon. R. K. Greene, Judge of Probate, Hale County, Quarterly Reports, Attorney General, Vol. XX, page 237; opinion dated January 29, 1937 to Hon. C. B. Gullatt, Jr., Judge of Probate, Russell County, Biennial Report, Attorney General, 1936-38, page 86; opinion dated March 19, 1937 to Hon. E. A. Hammett, Judge of Probate, Talladega County, Quarterly Reports, Attorney General, Vol. VI, page 164.

In the last cited opinion it is observed that this statute must be strictly construed, and so construing it I am of the opinion that you are not authorized or required to execute a deed to the purchaser's widow or to said widow and adopted son, on account of the fact that the certificate of purchase does not appear to have been assigned to them or either of them.

The words "assign" and "assignment" when used in connection with a written instrument import, in my opinion, some perfected transaction between parties intended to vest in one of them, called the assignee, a present right in the thing assigned, or a contract subject to the same requisites as other contracts such as two or more parties' mutual assent and a consideration. **In re Goodwin's Estate,** 296 N. Y. S. 733; **Hutsell v. Citizens National Bank,** 64 S. W. (2nd) 188, 166 Tenn. 598.

I doubt whether the words "person to whom the certificate of purchase has been assigned" can be said to include the heirs or distributees of a person dying intestate as in the present instance, and especially so when there has not been even an administration upon the estate of such decedent.

I am of the opinion, therefore, that the rights of the widow and adopted child will have to be determined in some appropriate legal proceeding. I doubt also whether she could maintain a petition for mandamus against you under the circumstances stated to enforce execution and delivery to herself of a deed in this instance. Her proper remedy would probably be by a bill in equity to have her rights established and enforced as against the former owner of the property sold for taxes.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 17, 1941.

Hon. A. H. Collins,
State Superintendent of Education,
Montgomery, Alabama.

Schools — City Superintendents of Education — City Boards of Education —

A contract, whereby a city superintendent of education is employed for a definite term, would not prevent a removal of said superintendent before the expiration of said term for the causes set out in Section 219 of the School Code of 1927.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 9, 1941, which is as follows:

"Section 219 of the Alabama School Code of 1927 reads as follows:

"'APPOINTMENT OF CITY SUPERINTENDENT OF EDUCATION. The City Board of Education may appoint a City Superintendent of Schools to hold office at the pleasure of the Board. The City Superintendent of Schools shall receive such compensation as the City Board of Education shall direct. The City Board of Education may remove the City Superintendent of Schools for incompetency, immorality, misconduct in office, wilful neglect of duty, or when, in the opinion of the Board, the best interests of the schools require it.'"

"Your opinion is requested on the following question:

"Since a City Superintendent of Schools holds office at the pleasure of the Board, can a City Board of Education legally bind itself by a contract made with a City Superintendent of Schools which contract provides for a definite term of employment such as two years, four years or any other definite period of time?"

I am of the opinion that your inquiry should be answered in the negative in so far as it affects the removal of said superintendent from office before the expiration of the alleged term.

The case of **Dunlap v. Board of Education of Winston County**, 218 Ala. 631, 120 So. 144, involved a suit by a city superintendent of education for a breach of contract entered into by said superintendent and a de facto city board of education. The contract there considered was for an employment for a definite term and was breached by a dismissal of said superintendent before the expiration of said term. In said case the Court observed:

"Be it understood that the terms and incumbency of the city superintendent of schools and that of county superintendent of schools are different. McMurray v. County Board of Education, 216 Ala. 144, 112 So. 644; Petree v. McMurray, 210 Ala. 639, 98 So. 782. The county board of education or its members are not liable for the alleged breach of contract by the de facto city board. **If this question had been answered in the affirmative, there is yet another reason why this plaintiff cannot recover; his term and incumbency are not so protected against removal. It was provided by section 182, School Code of 1924, that the city board of education had the right of removal of a superintendent for stated causes, or 'when, in the opinion of the board, the best interests of the schools require it.'** Gen. Acts 1919, pp. 567, 600, art. 9, par. 1. And, had the suit been against the contracting party, the necessary and required allegation would have been that this discretion granted the board was not exercised in good faith or corruptly used, or exercised. The exercise of honest judgment, though erroneous, is not the abuse of discretion. State ex rel. King, v. County Board, 214 Ala. 621, 108 So. 588." (Emphasis supplied)

Section 219 of the School Code of 1927 is identical in legal effect, if not in language, to section 182 of the School Code of 1924. **Quarterly Report of Attorney General, Volume XVII,** page 142. Therefore, the rule set out in the Dunlap case, supra, is applicable to your inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 17, 1941.

Hon. R. E. McAdory, Solicitor,
Tenth Judicial Circuit of Alabama,
Birmingham, Alabama.

Deputy Circuit Solicitor, a member of the Officers' Reserve Corps of the United States Army, is entitled to the twenty-one day military leave of absence with pay allowed by Section 12 of Act No. 143, H. 63, approved April 22, 1936 (General Acts, 1936, page 105), as amended by Section 5 of Act No. 509, H. 773, approved September 22, 1939 (General Acts, 1939, page 774).

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your letter of April 11, 1941, in which you request an official opinion, is as follows:

"The Third Deputy Circuit Solicitor of the Tenth Judicial Circuit (Jefferson County) is a member of the Officers Reserve Corps of the United States Army and has been called into active service. His salary

is paid pursuant to the provisions of Act No. 73, House Bill 177, approved March 31, 1936 (General Acts, extra session, 1936, p. 35) and subsection II, of Section 1 of Act No. 247, Senate Bill 239, approved August 24, 1939 (General Acts 1939, p. 411 at p. 412) and subsection (c) of Section 2 of Act 329, House Hill 147, approved August 31, 1939 (General Acts 1939, p. 468 at p. 470).

"It seems clear that under the rulings made by the Attorney General appearing in Quarterly Reports of the Attorney General, Volume XXI, pp. 34, 212, that said Deputy Circuit Solicitor is entitled to military leave with pay for twenty-one days. However, I would like to know if I am correct in my interpretation of these opinions."

You are correct in your conclusion that the opinion of this office in Volume XXI, page 34, applies to a deputy circuit solicitor of the Tenth Judicial Circuit to the extent that it holds that an officer or employee in the service of the State of Alabama is entitled to the twenty-one day military leave with pay provided by Section 12 of Act No. 143, H. 63, approved April 22, 1936 (General Acts, 1936, page 105) as amended by Section 5 of Act No. 509, H. 773, approved September 22, 1939 (General Acts, 1939, page 774).

This office has heretofore held in an opinion rendered to Hon. W. D. Bishop, President of County Commission of Jefferson County, under date of December 12, 1933 (Office Edition, Reports of Attorney General, Volume 16, page 214), a copy of which is enclosed herewith, that a deputy circuit solicitor of Jefferson County is a state and not a county officer. This being true, the provisions of Section 12 of Act No. 143, as amended, supra, which provide for the twenty-one day military leave of absence for "all officers and employees of the State of Alabama" are applicable to the deputy circuit solicitor concerning whom you inquire.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 17, 1941.

Hon. James F. Brawner,
Acting Director,
Dept. of Public Safety,
Capitol.

Drivers' licenses — Department of Public Safety —

1. The Director of Public Safety, with the approval of the Governor, may promulgate a rule and regulation allowing a person who now possesses a driver's license, which expires on September 30, 1941, a period of grace within which to make application for a new driver's license.

2. The Director of Public Safety, with the approval of the Governor, may promulgate a rule and regulation authorizing the several probate judges over the State to accept applications for 1942-43 drivers' licenses on September 1, 1941.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of April 4, 1941 follows:

"Section 1, Act 181, Regular Session 1939 Legislature provides among other things that driver's licensing period shall be two years from September 30, 1939 and each two years thereafter and that driver's license will expire at end of licensing period. This makes old drivers' licenses expire on the same day new licenses are due with no grace period between date of expiration and date of delinquency.

"It is believed that under Section 14 the Director with the approval of the Governor could promulgate a rule extending the period of delinquency so as to run concurrently with other licensing departments of the State; viz., November 14.

"An opinion is requested of you as to whether my idea as outlined above is correct.

"Section 3 of the above mentioned Act provides among other things that the Judges of Probate shall by the tenth day of every month make a report showing the number of licenses issued during previous calendar month, one copy to be sent to the Director of Public Safety, one copy to the State Comptroller, one copy to the State Treasurer and he shall retain one copy and that he shall at the same time deliver all monies received during above period to the State Treasurer and that these funds be kept in a separate fund by the Treasurer to be known as the Highway Patrol Fund.

"Realizing the tremendous task facing the Probate Judges and the Commissioner of Licenses of Jefferson County in the handling of these applications for driver's licenses coming as they do while the bulk of other licenses are being issued, this office is seeking a way to relieve the congestion in the office of Judges of Probate and at the same time not sacrifice any revenues out of our 1942-43 licensing period (we could not maintain the Department if this should be done).

"An opinion is requested of you as to whether, inasmuch as 1942-1943 licenses will not be issued until October 1, 1941 by the Department of Public Safety, the Judges of Probate could, under the law, begin the acceptance of applications for 1942-1943 driver's licenses and issue receipt for monies received for same on September 1, 1941, dating said receipts October 1, 1941 and make remittance of these funds along with other monies taken in during the month of October 1941.

"If the law does not permit the above action could the Director with the approval of the Governor promulgate a rule under Section 14 of this Act that would accomplish the above results?"

In regard to your first inquiry, your attention is called to an opinion of this office rendered to Hon. Chester Walker, Judge of Probate, Tuscaloosa County, under date of September 5, 1939, wherein this office assented to a rule and regulation promulgated by the Director of Public Safety in accordance with Section 14 of Act No. 181, H. 245, approved March 18, 1939 (Gen. Acts, 1939, page 300), which rule and regulation granted to persons who then possessed a 1939 driver's license until November 14, 1939 to make application for a new driver's license. This opinion appears on page 30 of Volume XVII of the Quarterly Reports of the Attorney General.

I now adhere to this former opinion rendered by me, and you are advised, that you, as Acting Director of the Department of Public Safety, with the approval of the Governor, may promulgate a rule and regulation granting to persons who now possess a driver's license until November 14, 1941 to make application for a new driver's license. However, it is suggested that such rule or regulation should allow a person through November 15, 1941, to make application for a new driver's license, since he has through that date to purchase motor vehicle license.

In answer to your other general inquiry, you are advised that I see no legal objection to the plan outlined in your request, with slight modifications hereinafter noted, provided a rule and regulation embodying such plan is promulgated in the manner provided in Section 14, supra.

I have carefully read Act No. 181, supra, and nowhere in said Act is any specific date set out upon which an application for a renewal license may be made. Section 1 of said Act merely provides that driver's license shall expire after September 30, 1939, and every two years thereafter, and further provides that such license may be renewed upon application, but is silent as to when such renewal application shall be made. This being true, it is my judgment that a rule and regulation may be promulgated under Section 14 of said Act No. 181, providing that the several probate judges over the State and the Commissioner of Licenses of Jefferson County may receive applications for the 1942-43 license period on September 1, 1941, dating such applications as of the date they are actually made. In regard to the remittance of the fees received by the probate judges and the Commissioner of Licenses during the month of September for the 1942-43 license period, your attention is called to the pertinent part of Section 3 of Act No. 181, supra, which reads as follows:

"On the 10th day of every month the Judge of Probate shall prepare a report showing the number of applications received and permits issued and the amount of fees received during the previous calendar month. One copy of such report shall be forwarded to the Director of Public Safety, one to the State Comptroller, one to the State Treasurer, and he shall retain a copy. He shall also at said time deliver to the State Treasurer the amount of all such fees collected less ten cents (10c) for each application received or permit issued, which sum shall be retained by him, and shall be his sole compensation for performing any and all duties required

of him under the provisions of this Act. All funds remitted to the State Treasurer under the provisions of this Section shall be kept in a separate fund in the State Treasury to be known as the 'Highway Patrol Fund'."

It will be noted that by the 10th day of each month the probate judge shall remit to the State Treasurer all fees, less his compensation, received by him during the preceding calendar month. In my judgment, the probate judges must comply with this provision, and remit the fees received by them during the month of September, 1941 by the 10th day of October, 1941. However, you are advised that when the probate judges make the report required by the above section for the month of September, they may make two reports, one report showing monies collected during the month for the license period ending September 30, 1941, together with a check for that amount; and a separate report of the monies collected during the month for the license period 1942-43, and enclosing a check for this amount. Upon the receipt by the State Treasurer of these two reports and separate checks, it is my opinion that he may credit the monies collected for the 1942-43 license period to the credit of the Highway Patrol Fund for that period, instead of crediting these monies to the credit of this fund for the period ending September 30, 1941. This for the reason that these monies are in payment for a license which is not actually due and payable until October 1, 1941.

The plan outlined above would keep such monies from being transferred from said fund and covered into the general fund as provided by Act No. 377, H. 510, approved September 15, 1939 (Gen. Acts, 1939, page 503).

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 17, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

National Forests — Distribution of proceeds from income — Department of Conservation —

1. State's pro rata share of the income derived from the National Forests is to be expended as prescribed by the Legislature for the benefit of the public schools and public roads of the county or counties in which such National Forest is situated.

2. In the absence of legislation directing how such funds shall be expended, county officials should place such funds in a special account until the Legislature directs the manner in which it is to be expended.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of April 7, 1941, follows:

"Attached herewith is copy of letter from Judge of Probate, R. K. Green, Hale County requesting me to advise him the distribution of $407.17 received by him from the State Comptroller.

"Please refer to the Acts of 1923, page 660 and the 1923 Code, Sections 1011 to 1015 relative to the distribution of funds from a National Forest in Lawrence, Winston and Franklin Counties, Alabama.

"It will be noted by you that no reference is made in the above Act to Hale County or any other county, and your opinion is asked as to which funds should benefit in Hale County."

It appears from the letter attached to your request that the National Forest about which you inquire is the Talladega National Forest, a part of which lies in Hale County.

In reply to the above request, your attention is called to Section 500, Title 16, United States Code Annotated, which reads as follows:

"Section 500. Payment of receipts to State for schools and roads. Twenty-five per centum of all moneys received during any fiscal year from each national forest shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the State legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated. When any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein. There shall not be paid to any State for any county an amount equal to more than 40 per centum of the total income of such county from all other sources. May 23, 1908, c. 192, 35 Stat. 260; Mar. 1, 1911, c. 186, Sec. 13, 36 Stat. 963; June 30, 1914, c. 131, 38 Stat. 441."

It will be noted from the above that the State is to receive twenty-five per cent of all monies derived from the national forests, and such monies are to be expended as directed by the Legislature, for the benefit of the public schools and the public roads of the county or counties in which said national forest is situated.

An extended search of the acts of this State fails to reveal where the Legislature has prescribed any manner for the expenditure of funds derived from the Talladega National Forest. The only act which I find in regard to this subject is Act No. 497, H. 347, approved September 29, 1923 (General Acts, 1923, page 660). However, this act is limited to the distribution of the funds derived from the Alabama National Forest which is located

in Lawrence, Winston and Franklin Counties. This act, in my opinion, could not be taken as a criterion for the distribution of the funds derived from the Talladega National Forest.

In the absence of any legislation as to the distribution of the funds derived from the Talladega National Forest, you are advised that, in my opinion, the county officials of the various counties, which are entitled to participate in the distribution of the income from such national forest, should place such funds in a special account, and await further action of the Legislature directing how these funds should be expended.

What has been said hereinabove is applicable to all of the other counties of the State with the exception of Lawrence, Winston and Franklin Counties.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 17, 1941.

Hon. G. A. Moseley,
Sheriff, Montgomery County,
Montgomery, Alabama.

Guardianship — Sheriffs —

A guardianship created under Section 8101 of the Code of Alabama, 1923, attaches to the office of sheriff.

A sheriff acting as guardian under the above section is automatically removed as guardian when he is impeached and removed from office.

In such instances the succeeding sheriff becomes guardian by virtue of his appointment as sheriff.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of April 7, 1941, in which you request my official opinion as follows:

"It is requested that an opinion be rendered on the following statement of facts:

"A sheriff is appointed guardian of the estate of a minor pursuant to the provisions of Section 8101 of the Code of Alabama, 1923. Subsequent thereto the sheriff files an additional bond covering the guardianship only. The sheriff is impeached and removed from office.

"Question:

(1) Does the removal of the sheriff from office carry with it his removal as guardian of said Minor?

(2) If the sheriff is removed as guardian by his removal from the office of sheriff, is the succeeding sheriff guardian of said estate by reason of his appointment as sheriff?

"It will be greatly appreciated if an opinion is rendered as soon as possible."

In my opinion both of your inquiries should be answered in the affirmative.

Section 8101 of the Code of Alabama, 1923 is as follows:

"8101. **Sheriff may be appointed guardian.**—If no fit person is appointed and qualifies as guardian of a minor, and there be no general guardian for the county, the sheriff must be appointed guardian, and the guardianship attaches to the office of sheriff."

It is my opinion that the language of this section is clear and free from ambiguity. This being true, the guardianship attaches to the office of sheriff as provided in the section. Therefore, it would not follow the sheriff when he is removed from office. The guardianship would remain a part of the office and would have to be administered by the succeeding sheriff. **Pearce vs. Hall,** 113 Ala. 245, 21 So. 250, 251.

Sections 2683 and 5028, Code of Alabama, 1923, are as follows:

"2863. **Property and papers delivered to successor.**—In all cases in which it is not otherwise expressly provided, when any office is vacated, except by the death of the incumbent, all books, papers, property, and money belonging or appertaining to such office must, on demand, be delivered over to his qualified successor."

"5028. **Failure of sheriff, clerk, or register to pay over money to successor.**—Any sheriff, clerk of the circuit court, or register, or probate judge, who, having in his hands, at the expiration of his official term, any money held by him subject to the further order of any court, on demand of his successor in office, fails to pay over to him such money, must, on conviction, be fined not less than fifty nor more than five hundred dollars."

It will be observed that under these sections it is mandatory upon an outgoing sheriff to deliver to his successor all books, papers, property and

money belonging to the office. The section under which the appointment was made states that the guardianship attached to the office of sheriff, and under the provisions of the last quoted Code section, I am of the opinion that the outgoing sheriff should deliver to his successor all the books, papers, property, and money in his possession belonging to or connected with the guardianship.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 17, 1941.

Hon. Travis H. Johnson,
Treasurer, Walker County,
Jasper, Alabama.

County governing body is not required to deduct from the monthly compensation of a salaried employee such amounts as may have been paid said employee by the county for jury service during the month.

Opinion by Attorney General.

Dear Sir:

I have your letter of April 10, 1941, in which you request my opinion as follows:

"Please give me an opinion from your office on the following question:

"In this County the Board of Revenue has employed certain men, such as Shop foreman, Bridge foreman, shovel operators, mechanics, road machinery operators, etc., and fixed their salary and these persons work as required by the Board of Revenue and their Salary is paid out of the Gasoline fund.

"There are times when a County Employee, (That is on Salary) is summoned for Jury Duty by the local court and serves on the Jury during the time Court is in session, and upon dismissal or being excused by the Judge comes to the Circuit Clerk's office and claims his attendance. The Jurors Certificate is presented for payment at the Treasurers office and is paid.

"Question: Should a person who is employed by the County and on a salary claim attendance for Jury Duty? If attendance is claimed and paid should the amount so paid be deducted from the amount of salary allowed that person?

"Example: County Employee (as mentioned above) draws salary of $160.00 per Mo. Said employee serves 4 days on Jury @ $3.00 per day. Claims attendance for Jury duty and draws $12.00.

"Question: Should warrant be made for full amount of Salary $160.00 or should the $12.00 be deducted and warrant for Salary be $160.00 less $12.00 paid for Jury Duty — Net amount of Warrant $148.00?

"(Salary is paid out of Gasoline fund which is a tax fund or public fund same as General Fund that is used to pay for Jury Duty.)"

A person who is summoned for jury service has no choice as to whether or not he will serve. The law has seen fit to allow members of certain professions or vocations the right to claim exemption from jury service. Unless one is entitled to claim such an exemption, he must perform this public service regardless of his profession or vocation.

It is my opinion that a person who is employed on a salary basis by Walker County is entitled to compensation for the performance of jury duty and I do not think that the county would be authorized to arbitrarily deduct from his monthly compensation the amount of money which was paid him during that month for jury duty.

County employees such as the one mentioned in your letter of inquiry are employed on a contractual basis by the county governing body and that body at the time of the employment has the right to fix the terms thereof. Of course, if the contract of employment provides that the employee must suffer deduction for those days on which he does not work, regardless of the cause of his absence from work, then the county governing body would be justified in making such deduction as is contemplated under the terms of the contract of employment.

It is my opinion, however, that in no event would the county be justified in making the deduction as outlined in your letter.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 19, 1941.

Hon. Thomas W. Graff, Reporter,
Circuit and Inferior Courts,
Elmore County,
Wetumpka, Alabama.

Court Reporter — County —

County authorized to purchase desk and chair for court reporter.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of March 18, 1941, is as follows:

"IN RE: Court Reporter's supplies.

"With reference to an opinion in the biennial reports of 1926-8, page 285, I should like to know whether or not the County has authority to purchase for the official court reporter a suitable desk and chair to be used by him in his office in connection with his duties in transcribing testimony."

It is my opinion that the county may purchase a suitable desk and chair for the official court reporter to be used by him in his official capacity.

Sections 6734 and 6735 of the Code of Alabama, 1923, state a majority of the duties of the court reporter. These sections are as follows:

"6734. **Duties of court reporter.**—The official court reporter shall attend in person, except as otherwise herein provided, the sessions of court held in the circuit for which he is appointed, and in every case where directed by the judge or requested by a party thereto, he shall take full stenographic notes of the oral testimony and proceedings, except argument of counsel, and note the order in which all documentary evidence is introduced, all objections of counsel, the rulings of the court thereon, and exceptions taken or reserved thereto. When directed by the said judge he shall attend the investigations of the grand jury and there take such notes of the testimony as directed by the solicitor or foreman. The original stenographic notes of such court reporter in each case or proceeding officially reported shall be preserved by him and treated as a part of the records of the respective courts, and upon his retirement from office, shall be turned over to the clerks of such courts. In equity cases where the testimony is taken orally before the judge, **the court reporter, whenever ordered by the judge, shall transcribe his stenographic notes of such oral testimony,** and file same in the cause. For such transcript of his stenographic notes the court reporter shall be paid a fee of ten cents for each hundred words thereof, which shall be taxed as a part of the costs in the case." (Emphasis supplied)

"6735. **Transcript furnished to parties; fees for.**—The court reporter shall furnish, within thirty days, or such other time as the judge may prescribe, to any party to a cause reported by him, upon demand being made for the same, or upon order of the presiding judge, a **typewritten transcript of his stenographic notes or any part thereof,** except proceedings before the grand jury, upon payment of a transcript fee of ten cents for each one hundred words thereof, and for each carbon copy made at the same writing, five cents for each one hundred words thereof; but such court reporter shall not be required to perform any part of such service until the payment or security thereof is assured." (Emphasis supplied)

From the underlined portions of the above quoted sections, it is apparent that the duty to furnish a typewritten transcript in certain instances is placed

upon the court reporter by law. In order to efficiently do this, it is, of course, necessary that the court reporter have a desk and chair.

Section 6741 of the Code of Alabama, 1923, provides as follows:

"6741. **Stationery and supplies (sic) furnished by counties.**—All stationery and supplies to be used by such official or special reporters in their capacity as such shall be furnished and paid for by the county or counties composing the respective circuits in the manner provided for the payment of the salaries of such official and special reporters on requisition signed and approved by the judge of the court."

It is my opinion that in view of the duties imposed by law upon the court reporter a suitable desk and chair would come within the meaning of the word "supplies" as used in this section. Therefore, the county, or counties, that comprise the judicial circuit would be authorized to furnish the official court reporter with a desk and chair on a requisition signed and approved by the Circuit Judge. Cf. Quarterly Report of Attorney General, Volume XVII, page 306.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 19, 1941.

Hon. W. H. Holcombe,
Sheriff, Mobile County,
Mobile, Alabama.

Sheriffs — Fees — Guard Fees —

1. Guard fees of sheriff held earned at the time the services are performed.

2. Sheriff whose mode of compensation has been changed during his term of office from fees to salary, held entitled to fees earned during the period in which said sheriff was compensated on fee basis, although such fees did not become payable until said sheriff was being compensated on salary basis.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 2, 1941, in which you request my official opinion as follows:

JAMES F. MATTHEWS

"I would like to have your opinion on the following matter.

"The Board of Revenue and Road Commissioners take the position that I am not entitled to the $2.00 allowance for guarding prisoners provided for in Section 3741 in cases that were instituted during that part of my term that was served under the fee system, but which were not tried until after November 15, 1940, when the method of compensation was changed to a salary basis.

"Apparently their theory is that the proviso that the allowance shall be paid when conviction follows arrest means that it is not earned until the date of conviction.

"My contenton is that I am entitled to the allowance even though the trial was not had or concluded, or to be exact, final entering of a judgment was not made until after the system of compensation was changed. My theory is that we earned the allowance by guarding the prisoner from the date he was committed to our custody. The allowance is presumably provided to defray expenses of guarding a prisoner. If the Board of Commissioners are correct in their position, I could have been required to undergo the expense of guarding a prisoner for six months or more prior to November 15 and if the prisoner was tried and convicted on November 15, the date the Proclamation by the Governor regarding the adoption of the Constitutional Amendment was signed, I would be entitled to no compensation for my services even though those services were rendered while under the fee system.

"Surely no such position would be taken by the Board as to felony cases in which the code provides a $2.00 guard allowance 'whether convicted or not' in cases that are not concluded until after November 15, 1940.

"If the Board is correct, it would also appear that in the case of a Sheriff whose term had expired before the trial of a defendant arrested during his term (under the fee system) he would not be entitled to the allowance, because he would be out of office completely and would have no claim whatever to the allowance, the said allowance going to his successor, who may not have guarded the prisoner but one day, or may not have guarded him at all if the prisoner was out on bond and not in his custody at the time of the trial.

"I do not think any such construction would be considered sound, because all of the work would have been done by this succeeding Sheriff's predecessor under the fee system, and the succeeding Sheriff would have rendered no service in connection with the case. Surely it will not be contended that because the Sheriff who performed the services is out of office (as I now am as to fees) he would not be entitled to pay for services rendered while under the fee system. The County of Mobile's position is analogous to the succeeding Sheriff in the example set out above, and have succeeded me in so far as fees and allowances now earned under the salary system are concerned.

"I think, from a layman's point of view, it is a sound construction to hold that the allowance is earned by the Sheriff receiving the original committment (sic), but that it is not collectible until the case is disposed of. To hold otherwise it would seem to me that the next conclusion to reach would be that, despite the fact that a succeeding Sheriff (the County as to fees in this instance) had performed no guard services whatever he would be entitled to the allowance or to assume the absolutely untenable position that no one is entitled to it.

"I will be obliged if you will render your opinion on this matter as soon as possible as there are a number of cases in which we have earned allowances for guarding prisoners for which we have already filed bills, and which are yet to be filed."

In reply I wish to advise that your inquiry presents two principal questions which I shall here number and answer in order. These questions may be stated as follows:

(1) When is the guard fee of a sheriff earned?

(2) Is an officer who earned fees while on a fee basis legally entitled to them when such fees are collected after the officer is on a salary basis?

In my opinion the guard fee of the sheriff is earned at the time the service is performed, regardless of the fact that the payment of the fee is contingent upon the later conviction of the defendant.

In Quarterly Report of Attorney General, Volume II, page 118, the rule concerning the time when officers' fees are earned or attach is interpreted by paragraph 29, in the following language:

" 'Question 29. A defendant is indicted for a felony and is arrested by the Sheriff on capias or warrant of arrest for such felony but on the trial of the case he is convicted of a misdemeanor, would the fee for executing such capias or writ of arrest be $4.00 or $2.00?'

"The answer to this question requires that a determination be made of when the fee attached. At the time the servicse are performed the defendant is charged with a felony and is indicted for a felony, but because of evidence or circumstances growing out of the trial of the defendant, he is finally convicted of a misdemeanor. In my opinion, the fees attach at the time the service is performed and become a liability in the amounts allowed by law for such services chargeable to the defendant upon conviction. It is therefore my opinion that the fee for executing the writ of arrest or capias charging a felony would be $4.00 as provided by law."

Cf. paragraph 18 in the above quoted opinion of the Attorney General, also the following opinions of the Attorney General: Quarterly Report of Opinions of Attorney General, Volume XVIII, pages 84 and 86; Quarterly Report of Opinions of Attorney General, Volume XIX, page 78.

Premises considered, it is my opinion that the fee is earned by the officer at the time the service is performed and the contingency of conviction determines whether or not the fee will be paid. Cf. Quarterly Report of Opinions of Attorney General, Volume XVII, page 354.

In reply to your second question, I wish to advise that in my judgment the officer whose mode of compensation has been changed from fees to salary is in the same position as an officer whose term of office on a fee basis has expired with earned fees pending the outcome of the cases in which the services were rendered. Under these circumstances, this office has held that when an ex-sheriff or ex-clerk has fees which have accrued against the Fine and Forfeiture Fund of his county since his retirement from office, said ex-sheriff or ex-clerk is the proper person to make out such claim and certify the same. Quarterly Report of Opinions of Attorney General, Volume XXI, page 18.

I also refer you to an opinion rendered by this office on March 6, 1924 (Biennial Report, Attorney General 1932-34, p. 522.)

Premises considered, it is my opinion that you, as sheriff are entitled to the fees earned in the cases named by you, although the final disposition of such cases and conviction of the defendant did not occur until after your mode of compensation had been changed. It is my opinion that you, as sheriff, are the proper person to certify these claims and to receive the named fees.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 19, 1941.

Hon. Otis R. Emmons,
Sheriff, Escambia County,
Brewton, Alabama.

Sheriffs — Constables — Arrests — Costs and Fees —

1. A constable has no authority to execute a warrant of arrest issued under Section 3815, Code of Alabama, 1923, by a justice of the peace and made returnable to the county court, where said warrant is directed "to any sheriff of the State of Alabama". If he does make such arrest he is entitled to no fee therefor.

2. Where a warrant of arrest is executed by a constable in a case where he has authority to so execute the warrant, he would be entitled to certain fees provided for in Section 3756, which are chargeable as part of the costs against defendant on conviction. Upon sentence to hard labor to pay the costs, the same may be paid, up to $5.00 in each case, by the Department of Corrections and Institutions under Section 3667 of the Code of Alabama, 1923.

3. A constable has no authority to commit a defendant to jail and is entitled to no fee therefor.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of March 11, 1941, in which you request my opinion as follows:

"Will you kindly advise me by return mail with reference to the following: There is a Constable in this County who was appointed by the Governor to serve as Constable of a certain beat. Since his appointment he has been serving warrants returnable to County Court which were issued by the Justice of the Peace returnable to the County Court which read as follows: 'To any Sheriff in the State of Alabama; Greetings:' etc. He is bringing the prisoner about thirty miles to jail, and filing in the case a bill for services as follows: Arrest $1.50; Mileage $3.00. When this man is convicted in County Court is the above fees to be taxes against the defendant and paid to the Constable? In other words, does the Constable have authority to arrest a man and place his case in County Court and then collect the fees when he is convicted? If this be true what authority does the Sheriff have more than the Constable? Of course, I understand the Constable can arrest defendants and take them before the Justice of the Peace in misdemeanor cases and in felony cases for preliminary trials, but what I want to know is, 'Does he have the same authority as the Sheriff with reference to returns in County Court and arrests made returnable to County Court?' If he does make the arrest does he receive the same fee as the Sheriff, or does he receive Constable fees?"

Supplementing your request, I have a letter from Hon. Reo Kirkland, Clerk and Register of Escambia County, under date of March 12, 1941, which is as follows:

"In Escambia County, Alabama, there is a Constable appointed by the Governor. Has he power to make a commitment to the County jail and is he (the Constable) entitled to the commitment fees, and mileage from his precinct to the County jail, which is outside of his precinct. And, do his powers enable him to make arrests and commitments out of his precinct? If the above is answered in the affirmative, does the State pay Constable fees in hard labor cases?

"I am enclosing a copy of the Affidavit and the Warrant of Arrest and commitment in a recent case, which, as you notice, is addressed to any Sheriff of the State of Alabama, and on which Warrant the said Constable made a commitment to the County jail.

"As there has been quite a controversy between committing officers in dealing with several cases, I would greatly appreciate your earliest ruling in this matter."

Rather than answer the questions presented categorically, I will endeavor to give a general discussion of the matters under consideration, which should give the desired information.

At the outset I wish to refer you to an opinion of this office found in Quarterly Reports of Attorney General, Volume XVI, at page 139, wherein it was held that a constable may exercise the usual authority of a peace officer in his own precinct and, in addition, he may serve any writ or warrant directed to him by lawful authority anywhere within his county. This opinion was based on the cases of **Henry vs. Waldrop,** 206 Ala. 135, 89 So. 371, and **Edwards vs. State,** 199 Ala. 555, 74 So. 956.

The warrant in the instant case under consideration was issued by a justice of the peace, returnable to the county court, under the authority of Section 3815, Code of Alabama, 1923. Instead of being in the form prescribed by Section 3816 and directed "To any lawful officer of the State of Alabama", it was directed "To any Sheriff of the State of Alabama".

The general rule as to who may serve warrants is stated in 6 Corpus Juris Secundum, page 576, and is as follows:

> "A peace officer may make an arrest under a warrant directed to either peace officers of his class generally, or to him by name, or by the designation of his office. He, however, has no right to make an arrest under a warrant directed to peace officers of another class".

See also **State vs. Wenzel,** 77 Ind. 428. "A constable cannot execute process addressed to the sheriff". **57 C. J. 782; Winkler vs. State,** 32 Ark. 539; **McGloughan vs. Mitchell,** 126 N. C. 681, 36 S. E. 164; Cf. **Lewis vs. State,** 178 Ala. 26, 59 So. 577.

I do not think that the general rule, as above stated, is changed in this State by the verbage of Section 3817, Code of Alabama, 1923, which is applicable to warrants issued under Section 3815, supra. Said section provides as follows:

> "3817. **By whom warrant executed.**—The sheriff or any constable of the county may execute the warrant of arrest, and bring the defendant before the court; and may summon the witnesses and serve all other process."

In my judgment, in order for a constable to execute a warrant issued under Section 3815, supra, it is necessary that said warrant be directed either to a peace officer of his class generally, or to him. Section 5221, Code of Alabama, 1923, which provides for the issuance and execution of warrants in preliminary proceedings, specifically states that the warrant must be directed "To any lawful officer, of the State", and further provides, "if executed by any lawful officer, having authority to execute it, it is valid, without regard to its direction". This section is applicable only to preliminary proceedings. **Sale vs. State,** 68 Ala. 530. There is no such validating provision concerning warrants issued under Section 3815, supra, and executed under Section 3817, supra. The fact that such a validating provision appears only in Section 5221, supra, shows, in my opinion, that it was not the legislative intent to vary the general rule, as above set out, in case of warrants issued under Section 3815, supra, by the verbage of Section 3817, supra.

In connection with the proper form of warrants of arrest in instances other than above discussed, I wish to refer you to Section 3860, Code of Alabama, 1923, relative to cases of which justices of the peace have final jurisdiction, and to Sections 3279 and 3280, Code of Alabama, 1923, relative to cases in which an indictment has been returned.

From the foregoing it follows in the instant case that the constable had no authority to execute the warrant in question and, consequently, would be entitled to no fee therefor.

In a case where a constable is authorized to execute a warrant of arrest, he would be entitled to the following fees provided for in Section 3756, Code of Alabama, 1923, to wit:

"3756. **Constables' fees.**— **** For executing any other warrant or writ of arrest $1.50

* * * * *

"For carrying a person before a magistrate under a warrant of arrest, or to jail when committed thereto, for himself and each necessary guard, to be proved by his own oath, for each mile ..... .10"

These fees will be properly chargeable against the defendant as part of the costs in case of conviction. If said defendant is sentenced to hard labor to pay the costs, the same are payable by the State Department of Corrections and Institutions under the provisions of Section 3667, Code of Alabama, 1923, as costs of constable, but the amount payable by the Department of Corrections and Institutions in any one case is limited to $5.00.—**Quarterly Report of Attorney General, Volume XXI, page 243.**

There is no commitment fee provided for a constable. Moreover, I know of no authority of law which authorizes a constable, himself, to commit a defendant to jail. He should turn said defendant over to the sheriff or jailer, who commits the defendant to jail. Consequently, there is no fee allowable to the constable in such instances.

I trust that the above gives you the information desired.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 22, 1941.

Hon. John Brandon,
Secretary of State,
Capitol.

Housing Authorities — Secretary of State —

1. Under facts stated, the Secretary of State properly issued a certificate of incorporation to the Commissioners of the Housing Authority of the City of Attalla.

2. Said authority may operate within the territory and to the extent indicated herein.

Opinion by the Attorney General.

Dear Sir:

Your letter of April 7, 1941, in which you request an official opinion, is as follows:

"Under date of September 20, 1940, an application for a certificate of incorporation of the Housing Authority of the City of Attalla, Alabama, was submitted to me. This application complied with the provisions of Act No. 148 of the 1939 Acts by stating in part the following:

"(a) that a petition of more than 25 residents of the city and area within 10 miles from the territorial boundary lines had been filed with the city clerk setting forth that there was a need for a housing authority in such city and 'surrounding territory.'

"(b) Notice was published in a newspaper in the 'surrounding territory.'

"Our attention has been called to the fact that this certificate of incorporation should not have been issued to the Housing Authority of the City of Attalla, Alabama, which was issued under the same date of September 20, 1940, because of the following conditions:

"1. The town of Attalla, Alabama, which has less than 10,000 inhabitants, adjoins the corporate limits of the City of Gadsden, Alabama, and, therefore, was and is within the Greater Gadsden Housing Authority area, chartered in 1936.

"2. The activities of the Housing Authority of the City of Attalla conflict with the program of the Greater Gadsden Housing Authority.

"Section 1 of Act No. 148 of the 1939 Acts reads in part as follows:

"'The boundaries of such authority shall include said city and the area within ten miles from the territorial boundaries of said city, but in no event shall it include the whole or a part of any other city nor any area included within the boundaries of another authority. In case an area lies within ten miles of the boundaries of more than one city, such area shall be deemed to be within the boundaries of the authority embracing such area which was first established, all priorities to be determined on the basis of the time of the issuance of the aforesaid certificates by the Secretary of State. If the council after a hearing as aforesaid, shall determine that neither of the above enumerated conditions exist, it shall adopt a resolution denying the petition.'

"Assuming that the city council of the City of Attalla complied with all the provisions of Act No. 148 and the above quoted provisions, and the result of an examination of the application to find that it contained the information provided by subsections 1 to 5, inclusive, of Section 1 of Act No. 148, the certificate of incorporation was issued.

"Please advise if, in your opinion, it was in order, in view of the information furnished the Secretary of State, for a certificate of incorporation to have issued to the Housing Authority of the City of Attalla. If your answer is in the affirmative please advise then, if because of any error on the part of the city officials of the City of Attalla the application for a certificate of incorporation was not in order what would be the proper procedure to have this corporation dissolved if it should be dissolved?"

The answers to your questions depend, of course, upon the construction of the acts of the Legislature authorizing the creation and operation of housing authorities within this state.

Act No. 56, H. 131, approved February 8, 1935 (General Acts, 1935, page 126), is the first legislation in this state authorizing the creation and operation of housing authorities. This act has twice been amended by subsequent legislation. Section 4 of said act was amended by Act No. 445, S. 318, approved September 13, 1935 (General Acts, 1935, page 947); and Sections 4, as amended, 15 and 16 of said act were amended, and Section 26 of said act was repealed, by Act No. 148, S. 76, approved March 17, 1939 (General Acts, 1939, page 219).

Section 4 of Act No. 56, as originally enacted and as amended, and Section 11 of said act are, in my opinion, the provisions of law most pertinent to your inquiry.

Your duties in connection with housing authorities in this state are defined in Section 4 of said act, and I call your attention to the fact that the amendments to Section 4 do not, in my judgment, make any changes in your duties. Section 4 of Act No. 56, supra, as originally enacted, is as follows:

"Section 4. NOTICE, HEARING AND CREATION OF AUTHORITY. Any 25 residents of a city or of the area within ten miles from the territorial boundaries thereof may file a petition with the city clerk setting forth that there is a need for an authority to function in the city and said sur-

rounding area. Upon the filing of such a petition the City Clerk shall give notice of the time, place and purposes of a public hearing at which the council will determine the need for an authority in the city and said surrounding area. Such notice shall be given at the city's expense by publishing a notice, at least ten days preceding the day on which the hearing is to be held, in a newspaper having a general circulation in the city and said surrounding area or, if there be no such newspaper, by posting such a notice in at least three public places within the city, at least ten days preceding the day on which the hearing is to be held. Upon the date fixed for said hearing held upon notice as provided herein, an opportunity to be heard shall be granted to all residents and taxpayers of the city and said surrounding area and to all other interested persons. After such a hearing, the Council shall determine (1) Whether unsanitary or unsafe inhabited dwelling accommodations exist in the city and said surrounding area and/or (2) whether there is a lack of safe or sanitary dwelling accommodations in the city and said surrounding area available for all the inhabitants thereof. In determining whether dwelling accommodations are unsafe or unsanitary, the council shall take into consideration the following: The physical condition and age of the buildings; the degree of overcrowding; the percentage of land coverage; the light and air available to the inhabitants of such dwelling accommodations; the size and arrangement of the rooms; the sanitary facilities; and the extent to which conditions exist in such buildings which endanger life or property by fire or other causes. If it shall determine that either or both of the above enumerated conditions exist, the council shall adopt a resolution so finding (which need not go into any detail other than the mere finding) and shall thereupon appoint, as hereinafter provided, five commissioners to act as an authority. Said commission shall be a public body and a body corporate and politic upon the completion of the taking of the following proceedings: The commissioners shall present to the Secretary of the State of Alabama, an application signed by them, which shall set forth (without any detail other than the mere recital) (1) that a notice has been given and public hearing has been held as aforesaid, that the council made the aforesaid determination after such hearing, and that the Mayor has appointed them as commissioners; (2) the name, and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this Act; (3) the term of office of each of the commissioners and the place where, if any, the official appointment of each of said members is kept of record; (4) the name which is proposed for the corporation; (5) the location of the principal office of the proposed corporation; (6) any other matter relating to the incorporation which the commissioners might choose to insert not inconsistent with the constitution and laws of the State of Alabama. The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the State of Alabama to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and sworn thereto in the officer's presence. The Secretary of State shall examine the application and if he finds that the name proposed for the corporation is not identical with that of a person or of any other corporation of this State or so nearly similar as to lead to confusion and uncertainty he shall receive and file it and shall record it in an appropriate

book of record in his office. When the application has been made, filed and recorded, as herein provided, the Authority shall constitute a public body and a body corporate and politic under the name proposed in the application; the Secretary of State shall make and issue to the said commissioners, a certificate of incorporation pursuant to this Act, under the seal of the State, and shall record the same with the application. The boundaries of such authority shall include said city and the area within ten miles from the territorial boundaries of said city, but in no event shall it include the whole or a part of any other city having a population of more than ten thousand inhabitants nor any area included within the boundaries of another authority. In case an area lies within ten miles of the boundaries of more than one city having a population of more than ten thousand inhabitants, such area shall be deemed to be within the boundaries of the authority embracing such area which was first established, all priorities to be determined on the basis of the time of the issuance of the aforesaid certificates by the Secretary of State. If the council, after a hearing as aforesaid, shall determine that neither of the above numerated conditions exist, it shall adopt a resolution denying the petition. After three months shall have expired from the date of the denial of any such petition, subsequent petitions may be filed as aforesaid and new hearings and determinations made thereon. In any suit, action or proceeding involving the validity or enforcement of, or relating to any contract of the authority, the authority shall be conclusively deemed to have been established in accordance with the provisions of this Act upon proof of the issuance of the aforesaid certificate by the Secretary of State. A copy of such certificate, duly certified by the Secretary of State, shall be admissible in evidence in any such suit, action or proceeding, and shall be conclusive proof of the filing and contents thereof."

I will not hereafter set out in haec verba the section, as first and last amended, but will summarize the effect of the amendments on the section as originally drafted.

Act No. 445, supra, merely amended Section 4 of the original act by providing "that in any area comprising within its boundaries a city of more than fifty thousand inhabitants, according to the last or any subsequent federal census, one additional authority may be set up for each fifty thousand of population or major fraction thereof, by which the population of said city exceeds fifty thousand." In my opinion, this change does not in any way effect your inquiry.

Act No. 148, supra, amends Section 4, as amended, by deleting therefrom that part of the section which authorized an authority to include within its boundaries the whole or part of another city having a population of ten thousand inhabitants or less (which was included in the section as originally enacted and as first amended), and by deleting the provision that in an area comprising within its boundaries a city of more than fifty thousand inhabitants, according to the last or any subsequent federal census, one additional authority may be set up for each fifty thousand of population or major fraction thereof, by which the population of said city exceeds fifty thousand (which was added by the first amendment). It is also to be noted that the last amendment to Section 4 includes the following proviso:

"Nothing contained in this section shall be construed as affecting the boundaries heretofore established for any housing authority."

As I understand your request, you have been advised that you should not have issued to the Housing Authority of the City of Attalla, Alabama, on September 20, 1940, a certificate of incorporation of that authority, for the reason that the City of Attalla is within ten miles of the corporate limits of the City of Gadsden, Alabama, in which city was located the Greater Gadsden Housing Authority, which was operating under a charter or certificate of incorporation issued in 1936.

In my opinion, when an application has been presented to you, you are only required to examine the application and determine: (1) if it complies with the following provisions of Section 4 of the act, as last amended, and (2) if the name proposed for the corporation is identical with that of a person or of any other corporation of the State or so nearly similar as to lead to confusion and uncertainty:

"The commissioners shall present to the Secretary of the State of Alabama, an application signed by them, which shall set forth (without any detail other than the mere recital) (1) that a notice has been given and public hearing has been held as aforesaid, that the council made the aforesaid determination after such hearing, and that the Mayor has appointed them as commissioners; (2) the name, and official residence of each of the commissioners, together with a certified copy of the appointment evidencing their right to office, the date and place of induction into and taking oath of office, and that they desire the housing authority to become a public body and a body corporate and politic under this Act; (3) the term of office of each of the commissioners and the place where, if any, the official appointment of each of said members is kept of record; (4) the name which is proposed for the corporation; (5) the location of the principal office of the proposed corporation; (6) any other matter relating to the incorporation which the commissioners might choose to insert not inconsistent with the constitution and laws of the State of Alabama. The application shall be subscribed and sworn to by each of said commissioners before an officer authorized by the laws of the State of Alabama to take and certify oaths, who shall certify upon the application that he personally knows the commissioners and knows them to be the officers as asserted in the application, and that each subscribed and swore thereto in the officer's presence." (Now 62-3 Sec 7 Code 1940)

If you find that the application contains all the information required by the above quoted part of Section 4, as last amended, and that there is no identity or substantial similarity in names, it is your duty to receive the application, file it and record it in an appropriate book in your office, and, thereupon, make and issue to the commissioners of the housing authority a certificate of incorporation under the seal of the state, which certificate should be recorded with the application.

It is my opinion, therefore, that you properly issued the certificate of incorporation to the Housing Authority of the City of Attalla, Alabama.

I am also of the opinion, based on the facts presented in your letter, that the mere fact that the Greater Gadsden Housing Authority was in existence

and operating prior to the time that the Housing Authority of Attalla was created, would not justify the dissolution of the latter corporation. At the time the Greater Gadsden Housing Authority was created, it had the right to include in its boundaries all of such parts of the City of Attalla as lay within ten miles of the boundaries of the City of Gadsden (Attalla having a population of ten thousand or less). However, in my opinion, this did not preclude the City of Attalla from establishing a housing authority of its own, to function in that part of the City of Attalla which was not included within the boundaries of the Greater Gadsden Housing Authority (if any), and in that area within ten miles from the territorial boundaries of the City of Attalla which was not included within the boundaries of the Greater Gadsden Housing Authority.

The 1939 amendment to Section 4, as amended, supra, does not, in my opinion, affect the boundaries of the Greater Gadsden Housing Authority, which had been created prior to the passage thereof, for the reason that said amendment is entirely prospective in operation. The prohibition contained therein against an authority including within its boundaries any part of another municipality, regardless of where located or its population, applies only to an authority created after the passage and approval of said amendment. This is clearly indicated, I think, by the last sentence of said section, as amended:

> "Nothing contained in this section shall be construed as affecting the boundaries heretofore established for any housing authority."

This being true, the Housing Authority of the City of Attalla, Alabama, does not have the right, even under the 1939 amendment to Section 4, as amended, supra, to operate in any of the territory which is included within the boundaries of the Greater Gadsden Housing Authority, except in accordance with the terms of Section 11 of the original act, which is as follows:

> "Section 11. COOPERATION BETWEEN AUTHORITIES. Any two or more authorities may cooperate with one another in the exercise of any or all of the powers conferred hereby for the purpose of planning, constructing or operating a housing project of (sic) projects located partly within the boundaries of each of said authorities. Any housing authority may construct and operate a housing project within the boundaries of any other housing authority provided that (1) such other housing authority consents thereto and (2) said housing project is located within ten miles of the city which is included in the boundaries of the housing authority desiring to construct and operate such project."

It follows from what has been said hereinabove, that you, as Secretary of State, were correct in issuing a certificate of incorporation to the Housing Authority of the City of Attalla, Alabama, and such housing authority may operate within the territory and to the extent hereinabove indicated.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 23, 1941.

Hon. Norvelle R. Leigh, Jr.,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Licenses — Judges of Probate —

1. Upon application to judge of probate for privilege license, it is duty of judge of probate to issue license applied for upon the payment of the proper amount, or amounts therefor, and the proper penalty or penalties, if delinquent.

2. In such cases, judge of probate is invested with authority to make such reasonable inquiries, and require such reasonable proof, as he deems necessary to enable him to properly perform such duty.

3. In all cases where a business, for which application for license is made, is commenced on or before April first, the amount required for a full year's license, with appropriate penalties, if delinquent, should be collected.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion of April 1, 1941 follows:

"Referring to our conversation this afternoon over long distance relative to the issuance of and payment for business license, Simons Compilation of the Revenue Act of 1935, Sec. 368, page 452 says in part 'Unless otherwise provided, if any business licensed by this Act shall **commence** after the first day of April in any year, the amount of the license or privilege tax shall be one-half of the year's license or privilege tax. **In all other cases** the license shall be taken out for the full term of one year, unless a shorter term is fixed by the provisions of this Act.' (Italics mine) On page 444 Section 353 (b) of the same Compilation I find the following: 'When any license is due the License Inspector shall cause the delinquent to appear before the Probate Judge of the County and take out the same, but such Probate Judge shall not have the authority to determine the liability of such delinquent for such license and shall in each case issue a license to the applicant upon the payment by him of the **amount or amounts** prescribed by this Act. (Italics mine).

"Mr. E. A. Zelnicker, State and County License Inspector of this County and I have discussed these two quotations in my office and Mr. Simon, Chief of the Business and Privilege License Division of the Department of Revenue, and I talked over long distance.

"The question in which we are interested is whether it is the duty of the Judge of Probate, when application is made for a license, to question

the applicant as to when he really began business and whether, if on such quizzing, it is found he began business before April 1st, it is the duty of the Judge to require payment for a full year. Messrs. Simon and Zelnicker are of the opinion that under the above quoted portion of Section 353, it is the duty of Judge when application is made after April 1st to issue the applicant a license for one half year if request is so made and leave it to the License Inspector to determine whether demand shall be made for a full year's license.

"The above quoted portion of Section 353(b) requires the Judge to issue a license to the applicant 'upon payment by him of the amount or amounts required by the Act,' and I am inclined to the opinion that in so far as the question here under consideration is concerned, the amount required by the act depends on whether the applicant commenced business before or after April 1st. In other words it seems to me that if the applicant commenced business before April 1, the amount which should be paid under the Act is the license prescribed for a full year, and it is the duty of the Judge to require such payment before issuing a license, though I am by no means sure that such construction is correct.

"All parties interested would like for you to give your opinion as to what are the respective rights and duties of the Probate Judge and the License Inspector under the circumstances outlined. Numbers of applications for licenses have been made today, others will be made tomorrow, and a reply at your earliest convenience will be greatly appreciated."

Section 350 of the 1935 Revenue Act provides in pertinent part as follows:

"Section 350. Before any person, firm or corporation shall engage in or carry on any business or do any act for which a license by law is required, he, they or it, except as otherwise provided, shall pay to the Judge of Probate of the County in which it is proposed to engage in or carry on such business or do such act, the amount required for such license, and shall comply with all the other requirements of this Act; and upon the payment of such amount and a fee of fifty cents to the Probate Judge for the issuance of such license and all costs and fees and penalties which shall have accrued, or which such person, firm or corporation shall have become liable in any proceedings commenced for the collection of such license, or to enforce payment thereof, and upon compliance with all other provisions of this Act by the applicant, such judge shall issue the license countersigned by him, in the form and on the blank to be furnished to him by the State Comptroller, which shall set forth and specify the name of the person, firm or corporation applying therefor, the business or act which it is proposed to carry on or do thereunder, the name of the street or location where it is proposed to carry on the same, if such location shall be in a city or town and have a street number, and if not, then the location and amount paid for such license, and the time for which it is issued."

Subsections (b), (c), and (d) of Section 353 of said act provide:

"(b) The Judge of Probate must in all cases in addition to the other penalties required to be collected by him, collect the citation fee, if any, due the License Inspector before issuing any license, and in case of motor vehicle where a license is taken out in the name of person not cited the citation fee shall be collected if citation filed shows the motor number of such vehicle. When any license is due the License Inspector shall cause the delinquent to appear before the Probate Judge of the County and take out the same, but such Probtae Judge shall not have the authority to determine the liability of such delinquent for such license and shall in each case issue a license to the applicant upon the payment by him of the amount or amounts prescribed by this Act. If such delinquent shall fail or refuse to take out license, the License Inspector shall institute or cause to be instituted criminal proceedings against such delinquent before any Court having jurisdiction of such offense. In case of emergency the License Inspector must commence the criminal proceedings in the first place. (c) All licenses levied by this Act except as otherwise provided shall be due and payable as of October first of each year and shall be delinquent November first thereafter. Where any license issuable by the Probate Judge or Commissioner of License shall be delinquent, the same shall be subject to a penalty of 15 per cent of the amount of the license, which penalty must be collected by the Probate Judge or Commissioner of Licenses when the license is taken out together with interest at 6% from the date of delinquency. (d) It shall be unlawful for any Probate Judge or other officer to fail to collect such penalties when issuing such license."

At the outset, I think it well to point out that it is the duty of the license inspector, and not the judge of probate, to see to it that a person who engages in a business for which a license is required has the appropriate license therefor. Cf. Opinion to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, under date of September 20, 1940, Quarterly Reports, Attorney General, Vol. XX, page 301.

However, in my opinion, when a person applies to a judge of probate for a license to engage in a business for which a license is required, it is the duty of the judge of probate to collect the proper amount or amounts for such license, and the proper penalty or penalties, if the person making application for the license is delinquent in securing the same. That this is so seems very clear from a reading of the provisions of Section 350, supra, and the provisions of subsections (c) and (d) of Section 353, supra. Section 350 requires a person to pay to the judge of probate of the county the amount required for the license, and requires the judge of probate, upon the payment of such amount, to issue the license. Subsection (c) provides the penalties for delinquency and that the judge of probate shall collect the penalties, in case of delinquency, and subsection (d) makes it unlawful for the judge of probate to fail to collect such penalties when issuing the license. With these duties placed upon the judge of probate, I think it follows that he may make such reasonable inquiries of the applicant as he deems necessary for the purpose of securing the information he needs in order to determine (1) the amount of the license, (2) whether or not the person applying for the same is delinquent in securing the license, and (3) if there is delinquency, the amount of the penalties. If this were not so, I do not see how the judge of probate could properly discharge these duties placed upon him by the above quoted statutory provisions. The nature of the inquiries in this regard, and the amount of proof which the judge of probate shall require in answer thereto, are matters

which address themselves to the judge of probate, subject, of course, to the requirement that such inquiries and the amount of proof required in answer thereto, must be reasonable. See opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama under date of December 4, 1935, Quarterly Reports, Attorney General, Vol. I, page 299.

The proviso in subsection (b) of Section 353, supra, to the effect that the judge of probate shall not have the authority to determine the liability of such delinquent for such license, but shall in each case issue a license to the applicant upon the payment by him of the amount or amounts prescribed by law, does not, in my opinion, militate against the conclusion hereinabove reached. That proviso, as I read it, simply means that when the license inspector has cited a person as a delinquent, then the judge of probate, in issuing the license, does not have the authority to determine whether or not the person is liable for the license, but if he issues the license, it is his duty to determine the proper amount, etc. due for such license.

Nor does anything said in the opinion to Mr. Henry, supra, militate against the conclusion hereinabove reached. In so far as the duty of the judge of probate in regard to the issuance of licenses is concerned, that opinion only held that it was the duty of the license inspector, and not the judge of probate, to see to it that a person secured a license, and that the judge of probate, as a condition precedent to the issuance of a license for a particular fiscal year, could not require the payment of a license for the preceding fiscal year.

Section 368 of the 1935 Revenue Act provides in pertinent part:

> "Section 368. Unless otherwise provided, if any business licensed by this Act shall commence **after the first day of April** in any year, the amount of the license or privilege tax shall be one-half of the year's license or privilege tax. In all other cases the license shall be taken for the full term of one year, unless a shorter term is fixed by the provisions of this Act. *** " (Emphasis supplied).

By virtue of this section, if a person commences a business for which a license is required **after the first day of April in any year,** he can secure a license therefor for one-half the amount required for the license on such business for a full year, unless otherwise provided. However, if he commences the business prior thereto, he is liable for the amount of the license for a full year, unless otherwise provided, and, if delinquent in securing the same, the appropriate penalties for such delinquency.

In view of the above, it is my opinion, if a person applies to you for a license to engage in a business within the purview of said section, after the first day of April, you should make such inquiries, and require such proof in answer thereto, as you deem necessary, in order to obtain the information you need to determine the amount due for the license, whether or not the person is delinquent in securing the same, and if delinquent, the amount of the penalties therefor. If, upon such inquiry, you find that the person began business **on or before April 1,** you should require the payment of the amount prescribed by law for a full year's license, together with the appropriate penalties therefor, as a condition precedent to the issuance of the license. On the

other hand, if, upon such inquiry, you ascertain that such person began business **after April 1,** you should only collect one-half the amount prescribed by law for a full year's license, together with the appropriate penalties for delinquency, if any.

Of course, if, at any time, a person applies for a license before he commences business during the current fiscal year, he would not be delinquent in securing the same, and no penalties for delinquency would attach; but, if the business is commenced during the current fiscal year before the license is secured, the delinquency runs from the date of the commencement of the business. However, if a person was engaged in business during a prior fiscal year and had secured appropriate license therefor, he has a period of grace within which to secure a license for the new fiscal year. This period of grace is from October 1 until November 1. See Subsection (c) of Section 353, supra, and Section 369 of the 1935 Revenue Act. Cf. Opinion to Hon. G. H. Howard, supra.

All dates used hereinabove apply to business licenses. As to the corresponding dates in regard to motor vehicle licenses, you are respectfully referred to an opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of April 18, 1940, Quarterly Report, Attorney General, Vol. XIX, page 57.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 24, 1941.

Hon. Norvelle R. Leigh, Jr.,
Judge of Probate,
Mobile County,
Mobile, Alabama.

Nuisance — Abatement —

1. Recording lis pendens notice in such cases is not taxed as costs in the case to which it relates.

2. A citizen is liable for recording fee where he files bill in name of State.

3. No provision for payment of recording fee when bill filed by State.

4. Probate Judge may apply to State Board of Adjustment for recording fee of lis pendens notice.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of March 25, 1941, is as follows.

"In your letter of March 20, 1941, to Hon. Bart B. Chamberlain, Solicitor of the Thirteenth Judicial Circuit, you expressed the opinion that where proceedings are brought under Section 9280, et. esq of the Code of 1923 to abate nuisances, it is necessary for the complainant to file at or before the commencement of the action a verified complaint in the office of the Judge of Probate and it is the duty of the Judge to record the entire bill of complaint and other notices accompanying the same upon being paid the usual fee.

"Mr. Chamberlain informs me it is his purpose to file in the near future a number of bills under the above Section of the Code to abate certain nuisances (houses of ill fame) alleged to exist in this city. The Judge of Probate of this court, as you doubtless know, is paid a salary and is required to collect all fees allowed by law and pay the same into the County Treasury.

"The proceedings contemplated by Mr. Chamberlain, will of course, be instituted and prosecuted in the performance of a duty which he as Solicitor owes the State, and the question which concerns me is whether I should charge fees for recording the bills of complaints and notices. Section 9284 of the code says in plain terms 'the probate judge shall be paid the usual fee for recording such Lis Pendens notice.' Does this mean that I should charge fees when actions are instituted under the circumstances above outlined?

"If—fees should be charged for the recordation of these instruments and I fail to collect them, my surety and I, of course, will be liable and it will be necessary for me to personally pay the treasurer the amount of any fee which I should have charged and failed to collect.

"Will you kindly advise me at your earliest convenience whether in your opinion I should require the payment of fees for recording bills of complaint and notices when filed for record by the solicitor to abate nuisances of the kind mentioned in Sections 9280 et seq. of the Code and oblige."

The question of fees referred to in your letter is to be found in Section 9284 of the Code of Alabama, 1923. This Sections is a part of Chapter 325 of the Code, defining nuisances and providing a remedy for their abatement. The statute deals with both public and private nuisances, and, in Section 9274, defines each. This section defines a public nuisance to be one which damages all persons who come within the sphere of its operation, though it may vary in its effects on individuals. This is substantially the common law.

Section 9280 of the Code of Alabama, 1923, deals primarily with a public nuisance. Section 9281 defines who may maintain such nuisance, and authorizes an injunction to abate the same. Section 9282 authorizes the Attorney

General or other prosecuting officer to file a bill to abate such nuisance. It also authorizes a private citizen, acting in the name of the State, to file a bill to abate such nuisance. If the bill is filed by a citizen, he must make bond before injunction is issued (Section 9283), and he cannot dismiss the case without making a sworn statement setting forth the reasons why the action should be dismissed, etc. Even then, if, in the opinion of the court, the case ought not to be dismissed, the court may direct the solicitor to proceed with the prosecution of such case. (Code Section 9282)

Considering these various sections, it is manifest that a public nuisance may be abated by the State, acting through its authorized officers, and it may be abated by a private citizen in the name of the State on his own responsibility.

With these preliminary statements in mind, we come to a consideration of your question as to the lis pendens recording fees found in Section 9284 of the Code of Alabama, 1923. It says: "The probate judge shall be paid the usual fee for recording such lis pendens." This manifestly refers to some other provision of law on that subject. This law is found in Section 6885 of the Code of Alabama, 1923, dealing with lis pendens records. This section provides that the probate judge, for the services rendered, shall receive 15c per hundred words for recording such notice. It is there further provided that this fee shall be paid by the person filing the same.

From the foregoing it is quite clear that if the bill is filed by a citizen he is liable for the recording fee, and it should be collected by you from him at the time of filing the certified copy of the bill and lis pendens notice. If the bill is filed by the Attorney General or other authorized officer named in Section 9282, supra, the filing is a charge against the State because it is acting through its authorized agents.

Now, the question arises, how can you proceed to collect this charge?

If the fee for recording could be treated as costs in the case, then the case of **State v. Inman**, 239 Ala. 348, 195 So. 448, would greatly simplify the question. In this case it is held that the State is liable for costs where it is the actor. To the same effect is an opinion issued out of this office (Quarterly Report of Attorney General, Vol. XIX, page 130). However, the recording fee here under review is not costs in the case referred to in the lis pendens notice. The words "costs" and "fees" are not synonymous. Each has a particular and appropriate meaning in law.

Troup v. Morgan County, 109 Ala. 162, 19 So. 503;

Bradley v. State, 69 Ala. 318;

20 C. J. S., page 259.

Costs are allowances to a party for expenses incurred in prosecuting or defending a suit during its progress, while fees are compensation fixed by law for public officers rendered in a discharge of their prescribed duties.

Stone v. State, 197 Ala. 293, 72 So. 563;

20 C. J. S., page 259.

25 C. J., pages 109-110;

Tillman v. Wood, 58 Ala. 578.

It is wholly untenable to argue that this recording fee is part of the costs of the case, because it is necessary for the recordation in order to maintain the suit. It becomes necessary to make the affidavits and bonds in some cases in order to institute suit, but that does not authorize taxing and collecting costs of making bonds or the premium thereon and affidavits to the losing party, or any party, for that matter. It cannot be fairly contended that the register could tax the recording fee in the probate office against the defendant in the abatement proceedings if the defendant lost the case. He taxes what accrues in his office, not elsewhere.

This process of having the lis pendens notice recorded raises the relation of debtor and creditor, and constitutes the services fixed for recording a deed.

Bradley v. State, 69 Ala. 319;

S. & N. Ala. R. Co. v. Bradley, 84 Ala. 469, 4 So. 611.

The recording fee is not costs of the case, but a debt against the State. Laying out of view all constitutional questions that may be suggested, where is the law on which our finger can be placed that provides for its payment? There are instances in the law of this State where administrative boards have been set up to administer and force the execution of laws dealing with certain character of subjects covered by legislation where appropriations have been made to carry out the purposes of the enactments, and in some instances provision is made for payment out of funds realized in the enforcement of the law; but the law dealing with the abatement of public nuisances has no such provision, nor have we been able to find any law authorizing payment out of public funds. The only thing left open to you is to apply to the State Board of Adjustment. If you properly present the case to this Board, and it disallows the same, then, in our judgment, you would be relieved of all liability for failure to collect such recording fees.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 25, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
Capitol.

Costs and Fees — Probation —

1. The authority to suspend sentence as to additional punishment imposed by the court under Section 5248 of the Code of 1923 has

no application to the additional hard labor imposed for non-payment of costs under Section 5291 of the Code of 1923.

2. In the case of an illegal suspension of sentence, which is not subsequently corrected, the officers' and witnesses' fees are payable out of the fine and forfeiture fund of the county, or its equivalent, provided there is a valid judgment for costs against the defendant and execution is issued and returned "No property found."

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of February 28, 1941, in which you request my opinion as follows:

"In reference to my letter to you under date of February 17, 1941 which is your request No. 868-A I wish to hereby withdraw same and substitute the following therefor.

"1. Please refer to opinion of the Attorney General, Biennial Report 1928-30, Page 93, and advise as to whether 'additional punishment' as referred to therein is applicable to Section 5291, Code of Alabama 1923.

"2. In case there is an unlawful suspension of sentence for costs, please advise how the officers and witnesses in question may collect their costs."

I am of the opinion that your first inquiry should be answered in the negative.

The opinion in Biennial Report of Attorney General, 1928-30, page 93, to which you refer, holds that under Section 5284 of the Code of 1923, sentence may be suspended only as to additional punishment imposed by the court. Said section provides as follows:

"Section 5284. Punishment by imprisonment in county jail or at hard labor for county, sentence for suspended or remitted.—When the court imposes additional punishment where a fine has been assessed by a jury, or in any case where the court is authorized to impose such punishment at imprisonment in the county jail or at hard labor for the county, the court may, in its discretion, suspend the execution of such sentence until a subsequent term of the court and may then order it to be executed or remit the same, or further suspend the execution of the sentence."

The "additional punishment" referred to in said opinion and in said section is not, in my opinion, applicable to the additional hard labor imposed for the non-payment of costs under Section 5291 of the Code of 1923.

In answer to your second inquiry, it is my opinion that in the case of illegal suspension of sentence, which is not subsequently corrected, the offi-

cers' and witnesses' fees may be paid out of the fine and forfeiture fund of the county, or its equivalent, provided that there is a valid judgment for said costs against the defendant and execution is issued and returned "No property found." **Quarterly Report of Attorney General,** Vol. XVII, page 222. See Section 4039, Code of Alabama, 1923, as amended.

This opinion does not take into consideration Act No. 278, S. 198, approved August 24, 1939 (General Acts, 1939, page 434), the law presently applicable to probation and suspension of the execution of sentences in general.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 25, 1941.

Hon. F. B. Thompson,
Judge of Probate,
Clay County,
Ashland, Alabama.

County Governing Bodies — Gasoline Tax Fund — Purchase of Road Equipment —

Counties may purchase road equipment for construction or repair of county roads, and contract to pay therefor, out of the State gasoline tax fund, allocated to the several counties of the State, over a period of twenty-four months.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion bearing date of April 16, 1941 follows:

"Our Commissioners Court on last Monday ordered Two Galion Diesel Motor Graders (Patrols) — which I disapproved and protested; and stated in open court that the county was not financially able to make the purchase; and that I would not sign the warrant or warrants for payment of the machinery unless ordered to do so by mandamus — or unless a ruling from your office held that I should do so.

"The order called for two of these graders with V type scarifiers @ $6,900.00 each — $13,800.00 with promise to pay said amount — as per the following terms: 'Lease contract 24 months $200.00 per month for first 12 months — $375.00 per month until paid. No interest'; said order given by unanimous vote of the four commissioners.

"I desire to know — 1st Is the purchase legal so that I should issue the warrants in payment of the indebtedness; and if I issue them will I be safe from liability on my bond for wrongful issuance of same?

"Following are copies of the bids submitted to the court and the bid of Miller G. Williams, Inc. — was accepted.

"1. Bid of Miller G. Williams, Inc.

"'1 or more Galion No. 101 Diesel Motor Grader-Tandem Drive— with hydraulic power control etc.,-with 11 tooth 7 type scarifier — delivered at Ashland, Ala. — $6,900.00. To be paid by lease sale contract — 24 months $200.00 each per month for 12 months; thereafter at the rate of $375.00 per month until end of contract; at which time the title passes to the county'.

"2. Bid of J. D. Pittman Tractor Co.

"'1 or more Caterpillar patrols $6,200.00 each; scarifier attachment $275.00 — $6,475.00; above machines may be leased for $269.79 per month with scarifier, 24 months, if so desired, with interest from date of delivery on deferred payments, above prices F.O.B. Ashland.'

"3. Bid of Joe Money Machinery Co.

"On 1 or more '99' Austin Western Motor Patrols — will 11 tooth V type scarifier — same price substantially as bid No. 1. All payments for above to be made from gasoline fund."

I note from the above request that the road machinery to be purchased is to be paid for out of the gasoline tax fund created by Schedule 156 et esq. of the 1935 Revenue Act.

It will be noted from the provisions of Schedule 156 et seq., supra, that the counties' part of this gasoline tax fund is to be used exclusively for the purpose of constructing, improving, maintaining and supervising the public highways and bridges of the county.

In this regard, I call your attention to Section 1397(110) of Michie's Code of 1928, which empowers the county governing bodies "to make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain, a good system of public roads, bridges and ferries in their respective counties." This office in an opinion rendered to the Commissioners Court of Chambers County under date of December 5, 1939, wherein the Commissioners' Court outlined a plan to purchase a quantity of lumber for use in the construction or repair of bridges within the county, (the plan calling for the purchase of the lumber over a period of twelve months, the purchase price thereof to be paid in monthly installments out of the gasoline tax fund) stated as follows:

"The plan outlined in your request for financing the purchase and use of lumber for construction and repair of bridges is, in my opinion, unobjectionable, and the commissioners court has the legal authority so to purchase the same and to contract for payment in the manner and from the funds mentioned."

This opinion appears on page 334 of the Quarterly Reports of Attorney General, Vol. XVII.

In this regard, I also call your attention to the case of **Isbell v. Shelby County, 235** Ala. 571, 180 So. 567, wherein the Supreme Court goes into a full discussion as to the expenditures by the several counties of the State of their allocable part of the gasoline tax fund.

I see no legal difference between the plan outlined in your request for the purchase of this road machinery and the plan outlined in the opinion hereinabove referred to. In legal effect the plan outlined by you, and the plan outlined in the above request are on all-fours.

You are therefore advised that, in my opinion, the order to purchase this road machinery was a legal one by the Court of County Commissioners, and warrants for the payment thereof should be issued by you. Cf. Quarterly Report of Attorney General, Volume XIII, page 65.

Since in my opinion this purchase was a legal one, there is no necessity of going into the question as to whether or not you will be liable on your bond for the issuance of these warrants.

Act No. 312, H. 575, approved September 2, 1935, Local Acts, 1935, page 189, which establishes the County Commission of Clay County, and defines its powers and duties, has been considered, but it does not, in my opinion, alter any of the conclusions hereinabove reached.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

April 25, 1941.

Hon. G. H. Howard,
Judge of Probate,
Elmore County,
Wetumpka, Alabama.

Counties —

1. County may pay reasonable and actual traveling expenses of representative of the county, incurred in efforts to secure passage of legislation by the Congress of the United States which will result

in the development and promotion of the agricultural, water, and other resources of the county, such payment to be made from the General Fund of the county.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of April 22, 1941, is as follows:

"There is now pending before Congress a bill, the substance of which is to develop the Coosa-Alabama Waterway System. The object of the bill is to provide for a nine-foot channel in the river system from Mobile, Alabama, to Rome, Georgia, for the purpose of navigation and flood control affecting the area contiguous to the two rivers, all as a part of the general National Defense Program of the United States Government. It will also affect, directly or indircetly, hydro-electric power on the river system, which would in turn affect the National Defense Program. On the Coosa River, at or near Childersburg, Talladega County, Alabama, there is in process of construction a large munitions plant. It is vital to national defense that ready transportation for products of said plant be provided to the open sea. This proposed project vitally affects Elmore County and it is regarded as being to the great interest of the County that the proposed objects of the bill be carried out.

"I believe that the Court of County Commissioners of Elmore County will indorse the program, and to that end, would be willing to incur reasonable expense in having some representative of the County to make such trips as may be necessary to see that the ends to be achieved are secured.

"I would like, therefore, to have your opinion on the following questions:

"1. Can the County legally have its attorney, or some other representative to be designated by it, work in harmony with other counties and municipalities interested in such project to the end that the objectives above set forth are achieved, and pay reasonable and actual traveling expenses of such representative, such payment to be made upon presentation of a claim for such expenses?

"2. If the first question is answered in the affirmative, then from what fund of the County should such claim for expenses be paid?"

As I understand your letter of inquiry, there is now pending before the Congress of the United States a bill which, if passed, would provide for the development of the Coosa-Alabama Waterway System. Further, this system passes through Elmore County, and its development, it is believed, will develop and promote the agricultural, water, and other resources of Elmore County. It also appears that efforts are to be made in behalf of the counties and municipalities interested in the development of the Coosa-Alabama Waterway System to secure the passage of this legislation, and you desire to know if

Elmore County may legally pay the reasonable and actual traveling expenses of a representative of Elmore County, (its attorney, or some other representative to be designated by the county governing body) incurred in such efforts, and, if so, from what fund the same may be paid.

It is my opinion that the county may legally pay the reasonable and actual traveling expenses of such representative, incurred in efforts to secure the passage of this legislation, and that the same should be paid from the General Fund.

Subsection 23 of Section 6755 of the Code of Alabama, 1923, as amended, which section deals with the authority of county governing bodies, provides that it has authority:

> "23. To set aside, appropriate and use county funds or revenue for the purpose of developing, advertising, and promoting the **agricultural,** mineral, timber, **water,** labor, and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties." (Emphasis supplied)

Our Supreme Court has twice considered questions similar to the one here presented. In the case of **Stone v. State ex rel. Armbrecht,** 220 Ala. 437, 125 So. 653, the Court had before it for consideration the question of whether or not a county governing body had the right to employ, and pay, an attorney to assist in the procurement of the enactment of legislation affecting the county, his duties in this connection including the drafting of such legislation, the making of trips to distant cities in connection therewith, and the spending of time at the capital with the legislature, having repeated conferences with legislative committees in regard thereto, etc. (The exact nature of the proposed legislation does not appear.) The statutory authority relied upon by the county in that case was the following proviso of Subdivision 8 of Section 5498 of the Code of Alabama, 1923:

> "But courts of county commissioners or boards of revenue may retain or employ attorneys, when it is deemed advisable or necessary, and the agreed compensation to them may be paid as are claims to grand and petit jurors."

The Court held that this proviso was not authority for the county to employ and pay an attorney to perform such services as hereinabove detailed.

However, in the later case of **Fitts v. Commission of City of Birmingham,** 224 Ala. 600, 141 So. 354, the Court had before it the question of whether or not the City of Birmingham had the authority to employ attorneys to perform similar services for it. In holding that the City of Birmingham did have such authority, through its governing body, by virtue of the provisions of the act pursuant to which said governing body was created, which vested in it a broad exercise of the police power, the Court, speaking through the same justice (Anderson, C. J.) who wrote the opinion for the Court in the Stone case, supra, distinguished that case from the Fitts case. He first pointed out that in the Stone case a county, and not a city, was involved, and observed that the general powers of the respective governing bodies were not necessarily

identical. He then pointed out that the statutory authority relied upon in the Stone case was the above quoted provision of Subsection 8 of Section 5498, which the Court strictly construed. In this connection he observed that some of the services, at least, could be performed as well by a layman as by an attorney. He then made this statement which I think particularly pertinent to the instant situation:

> "Moreover, there may be a good reason for permitting the towns and cities to incur the expense of obtaining favorable legislation through an attorney or other agent, and not granting the same right to the counties. The counties have the right to rely upon the legislative representatives to protect the interest of their respective counties, while the cities and towns cannot repose the same confidence in them as there may be several towns and cities in the same county and as to which rivalry may exist."

In the instant situation, the county does not have to rely upon the above quoted provision of Subsection 8 of Section 5498, supra, as was done in the Stone case, but may rely upon the authority granted to it in Subsection 23 of Section 6755, as amended, supra, since the passage of this legislation which provides for the development of the Coosa-Alabama Waterway System, it is believed, will develop and promote the agricultural, water, and other resources of Elmore County.

In holding, in the Fitts case, supra, that towns and cities might incur expenses in obtaining favorable state legislation through an attorney or other agent, though the same right was not granted to the counties, the Court gave as its reason the fact that counties had the right to rely upon their state legislative representatives to protect the interest of their respective counties, while the cities and towns could not repose the same confidence in them, as there might be several towns or cities in the same county as to which rivalry might exist. By analogy, I believe that counties have the right to incur expenses in obtaining favorable national legislation, through an attorney or other agent or representative, since there may be, and are (except in the Ninth Congressional District in this state) several counties in each congressional district as to which rivalry might exist.

It is true that county governing bodies are creatures of the legislature and may exercise only such powers as are delegated to them by the legislature. **Rhodes v. Marengo County Bank,** 205 Ala. 667, 88 So. 850. However, based on the reasoning of the Fitts case, supra, and on the provisions of Subsection 23 of Section 6755, as amended, supra, it is my opinion that the county governing body of Elmore County may legally pay for reasonable and actual traveling expenses of its representative, incurred in efforts to secure the passage of legislation by the Congress of the United States to provide for the development of the Coosa-Alabama Waterway System which, it is believed, will materially develop and promote the agricultural, water, and other resources of the county.

It is further my opinion that such expenses should be paid from the General Fund of the county. I do not believe that the special funds of the county, such as the Road and Bridge Fund, the Gasoline Tax Fund, and the Sales Tax Fund, and the fund containing the earmarked portion of the net profits of the State liquor stores which the counties receive, may be used to pay such

expenses, since the purposes for which the monies in these funds may be expended are limited by constitutional or statutory provision.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 1, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
The Capitol.

Department of Corrections and Institutions — Lawrence County Court — Trial Tax — County Court Fee — Court Reporter's Fee —

1. The $3.00 County Court fee provided for by Act No. 249, H. 455, approved August 29, 1919, (Local Acts, 1919, p. 86) is not a fee in addition to the State Trial Tax of $3.00.

2. Department of Corrections and Institutions is chargeable with $3.00 of the $5.00 Court Reporter Fee provided for by Act No. 194, H. 419, approved May 20, 1931, (Local Acts 1931, p. 61).

3. When through error and inadvertance an item which is chargeable to the Department of Corrections and Institutions and payable under Section 3667, Code of Alabama, 1923, is omitted from the cost bill presented to the State, the Department of Corrections and Institutions may legally pay such item at a later date.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

I have your letter of March 25, 1941, in which you request my official opinion as follows:

"Please refer to Act 249, page 86 Local Acts of 1919 and Act 194, page 61 Local Acts of 1931 and advise me in answer to the following questions:

"1. Is the $3.00 'County Court Fee' provided in Section 12 of the 1919 Act a fee that is in addition to the State Trial Tax of $3.00?

"2. If your answer to the above is in the affirmative would not the clerk of the County Court of Lawrence County be liable personally and on his bond in the event he failed to charge the 'County Court Fee' in instances where the costs were collectable and were in fact paid?

"3. In an instance where a defendant was sentenced to hard labor in the County Court of Lawrence County would not a Court Reporter Fee of $3.00 be chargeable in the bill of costs and payable by the State Department of Corrections and Institutions?

"4. In event your answer to No. 3 is in the affirmative and no Court Reporter's fees had been included in the cost bills sent to the State, could the present Clerk of the County Court of Lawrence County make up properly sworn to claims for such items as had not been properly claimed? If so, how many years or how far back could such items be claimed and be now payable by the State Department of Corrections and Institutions?"

My answer to your first inquiry is in the negative.

The Lawrence County Court was created by Act No. 249, H. 455, approved August 29, 1919, (Local Acts 1919, p. 86). Section 12 of said Act provides that there should be taxed against the defendant or defendants, a fee of $3.00, known as the "County Court fee", and shall be collected by the sheriff as other costs are collected, and paid over to the clerk of the Court, and the clerk shall, in turn, pay the same to the county treasurer of Lawrence County. The State trial tax is imposed by Section 9 of the 1935 Revenue Act, which reads in pertinent part as follows:

"Section 9. A trial tax of (Three Dollars) $3.00 be, and the same is hereby imposed in each case, civil, criminal, and equity, which is now pending and which hereafter goes upon the docket of any **circuit court in this State,** to be taxed and collected as other costs. *** " (Emphasis supplied)

It will be noted from the express language of the above quoted section that the State trial tax is imposed only in the circuit courts of this State.

Due to the fact that the court here considered is not a circuit court, you are advised that, in my opinion, the $3.00 "County Court fee" is not a fee in addition to the State trial tax. Quarterly Report of Attorney General, Volume XV, page 274.

Since my answer to your first question is in the negative, this renders it unnecessary for me to answer your second question.

My answer to your third question is in the affirmative.

Act No. 194, H. 419, approved May 20, 1931, (Local Acts, 1931, p. 61), creates the office of Court Reporter for the County Court of Lawrence County. Section 2 of said Act provides that, in addition to the compensation provided for said Court Reporter, there shall be taxed and collected as a part of the costs in each case of conviction, a fee of $5.00 for each day, or fraction thereof, that such Reporter shall be engaged in reporting a case and that the same be collected as other costs in such cases are collected. Section 3667, Code of Alabama, 1923, provides that the Convict Department shall pay a Court Stenographer's fee not to exceed $3.00.

Section 8 of Act No. 249, supra, provides that appeals from the County Court of Lawrence County may be taken directly to the appellate courts of this State. This fact places defendants sentenced from this Court in the same category with defendants sentenced from the Circuit Court, and when they are turned over to the Convict authorities of this State, renders the Department of Corrections and Institutions liable for $3.00 of the $5.00 Court Report Reporter's fee provided for in Act No. 194, supra. You are advised that, in my opinion, $3.00 of this $5.00 fee is a proper charge against the State Department of Corrections and Institutions as provided in Section 3667, supra.

My answer to your fourth question is in the affirmative.

Had this Court Reporter's fee been included in the original cost bills presented to the State, it could not, in my opinion, be successfully argued that this item was not payable by the Department of Corrections and Institutions. The fact that this item was through error and inadvertance omitted from the cost bill presented to the State, would not preclude its payment by the Department of Corrections and Institutions. I know of no statute of limitations in regard to the payment of these claims. You are, therefore, advised that the clerk of the County Court of Lawrence County may now present claims for the payment of these items, and such items are properly payable by the Department of Corrections and institutions provided such claims are otherwise proper. Cf. Biennial Report of Attorney General, 1934-36, page 132; Quarterly Report of Attorney General, Volume VI, page 171; Quarterly Report of Attorney General, Volume XX, page 154.

However, your attention is called to the fact that, if the defendants in these cases were not actually sentenced to pay these items of cost, then the Department of Corrections and Institutions would not be liable for the payment of these items, as that Department is only chargeable with those costs for which the defendant is actually sentenced. Biennial Report of Attorney General, 1934-36, page 693.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 1, 1941.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Department of Finance,
Capitol.

Fees — Probate Judges — Recording —

Under Section 7285 of the Code of Alabama, 1923, Judges of Probate, for their services in recording instruments, are entitled to 15 cents for each one hundred words or fraction thereof.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of April 10, 1941, follows:

"Re: Recording Fees allowed to Judges of Probate, Section 7285, Code of 1923.

"Enclosed please find copy of letter addressed to me from Mr. A. E. Ledyard, Assistant Examiner of Accounts, which is self-explanatory."

Mr. Ledyard's letter reads:

"Under four classifications of fees accruing for recording various instruments, one of which recites 'deeds and all other instruments, and all proceedings required by law to be recorded, and not otherwise provided for, for each hundred words.....15c.'

"All of the four subdivisions referred to above specifying a recording fee, use the identical wording, 'for each one hundred words.....15c.'

"I do not find any ruling on this matter and want to be advised as to the exact fees accruing for recording deeds and mortgages under this section. To be specific what fee should be collected on a deed or mortgage containing 640 words?

"Does the phrase 'each hundred words' mean that fees should be collected in multiples of 15, or should the words in excess of even hundreds be prorata to .15?

"If this has been ruled on previously, kindly give me the necessary references, and if not, will you please submit the question for decision and advise me?"

You have informed me that it is your understanding that the general practice followed by the judges of probate over the State, throughout the years, in calculating the fees due for the recordation of such instruments, is to charge 15 cents for each hundred words or fraction thereof.

I do not find where the appellate courts of this State or this office has passed on this question. However, provisions for compensating judges of probate for the recordation of instruments on the basis of "for each one hundred words — 15c" have long been a part of the statutory law of this State. See Section 3720 of the Code of Alabama, 1907. Since such provisions have long been a part of the statutory law of this state; the officers charged with the duty of administering the same, the judges of probate, have construed such provisions to mean that 15c should be charged for each one hundred words or fraction thereof contained in the instrument recorded by them; and the Legislature has re-enacted such provisions without change (Section 7285 of the Code of Alabama, 1923, cited in your letter of inquiry), I am constrained to hold that this construction of these provisions is controlling. See **State v.**

H. M. Hobbie Grocery Co., 225 Ala. 151, 142 So. 46; **Alabama Public Service Commission v. Jones**, 236 Ala. 310, 182 So. 452; and **Marie Walker Jones v. Roy Johnson, Tax Assessor**, (Supreme Court) 199 So. 539.

Premises considered, I am of the opinion that in calculating the fees due for the recordation of such instruments, the judges of probate should charge 15c for each one hundred words or fraction thereof contained in such instruments.

Cf. Opinion to Hon. B. P. Singleton, State Comptroller, under date of March 15, 1939, Quarterly Reports, Attorney General, Volume XIV, page 191.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 1, 1941.

Mrs. Edna N. Dunn,
Judge of Probate,
Conecuh County,
Evergreen, Alabama.

Licenses — Gasoline Filling Stations —

Where a person has taken out a gasoline filling station license in one county and thereafter moves the business so licensed to another county, he must procure another license, as provided for in Schedule 67 of the 1935 Revenue Act, as amended.

Opinion by Assistant Attorney General Russell.

Dear Madam:

I have your letter of April 24, 1941, in which you request my official opinion as follows:

"I would appreciate your rendering me an opinion on the following at your earliest convenience:

"There is a party who has been operating a filling station in Escambia County, Alabama. He has closed out this business in Escambia County and is going to move his business over into Conecuh County. Would this person be liable for another license here in Conecuh County just as if he had not purchased a business license in Escambia County or, would he be permitted to purchase a license here in this County and pay the County's part and the issuance fee and not be subject for the State's part on another license."

In answer to your inquiry, I advise that the party in question must procure another license, as provided for in Schedule 67 of the 1935 Revenue Act, as amended by Act No. 402, H. 936, approved September 9, 1935 (General Acts, 1935, page 876), before he can lawfully operate a filling station in Conecuh County, Alabama. There is no provision of the revenue laws which provide for a license, such as the one herein being considered, to be transferred from one county to another. The revenue laws provide only for the transfer of such a license from one place to another in the same county. — Section 349 of the 1935 Revenue Act. Cf. Quarterly Report of Attorney General, Volume XIV, page 85.

I deem it advisable to call attention to the fact that if the party in question commenced business in Conecuh County, Alabama, after the first day of April, 1941, then he would be entitled to a license for one-half the amount required for a full year's license. — Section 368 of the 1935 Revenue Act.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 1, 1941.

Hon. William E. Persons, Director,
Department of Corrections and Institutions,
Capitol.

Convicts — Pardons and Paroles — Section 3651, Code of Alabama, 1923, construed —

Convict, when paroled, entitled to cash payments provided for by Section 3651, Code of Alabama, 1923.

Opinion by Assistant Attorney General Russell.

Dear Sir:

Your request for official opinion of April 5, 1941, follows:

"Under Section 3651 of the 1923 Criminal Code of Alabama, this Department pays to each convict upon discharge, a stipulated sum known as discharge allowances.

"Please advise whether this Statute requires this Department to pay such sums to prisoners paroled under the authority of the State Board of Pardons and Paroles."

In answering your inquiry, I first wish to set forth Section 3651 of the Code of Alabama, 1923. Said section is as follows:

"3651. **Additional cash payment to convicts on discharge.**—In addition to the cash transportation and supplies to be furnished to state convicts **upon their lawful discharge from penal servitude,** as now required under existing laws, there shall be allowed and paid to each such convict whose term does not exceed five years, the sum of ten dollars in cash, and to each such convict whose term exceeds five years, the sum of ten dollars plus an additional sum in cash at the rate of two dollars per annum for each additional year, or fractional part of a year of not less than six months, of actual penal service after conviction. The said additional allowances and payments are made under existing laws." (Emphasis supplied)

It will be noted that convicts are entitled to the cash payment provided for in the above quoted section **upon their lawful discharge from penal servitude.** Thus it will be seen that in order to answer your inquiry, I must determine whether or not a convict is lawfully discharged from penal servitude within the contemplation of Section 3651, supra, when given a parole by the State Board of Pardons and Paroles.

I deem it advisable, before entering upon a discussion of this question, to point out that our appellate courts have never spoken on the same. After a careful study and consideration of the question, it is my opinion that a convict is lawfully discharged from penal servitude within the contemplation of this section when given a parole, and, therefore, your inquiry should be answered in the affirmative. The sole purpose of the Legislature in enacting the law which is now Section 3651, supra, was to place in the hands of one just released from the penitentiary some means of subsistence while he looked for a means of livelihood rather than put him out in the world penniless and force him to immediately resort to criminal ways in order to live. Certainly the purpose and reasoning behind such a law is equally applicable to a paroled convict as to one discharged upon the completion of his full sentence.

The conclusion herein reached is in accord with the administrative construction of long standing placed upon Section 3651, supra, which greatly strengthens the same. — **State v. H. M. Hobbie Grocery Company,** 225 Ala. 151, 142 So. 46; **Alabama Public Service Commission v. Jones,** 236 Ala. 310, 182 So. 452; and **Marie Walker Jones v. Roy Johnson, Tax Assessor,** (Alabama Supreme Court) 199 So. 539.

It is my opinion that there is nothing in the act creating the Board of Pardons and Paroles (Act No. 275, S. 186, approved August 25, 1939, General Acts, 1939, page 426) or the so-called Probation Act (Act No. 278, S. 198, approved August 24, 1939, General Acts, 1939, page 434), which militates against the conclusion reached in this opinion. The same is true of the recent case of **Pinkerton v. The State,** (Ala. App.), 198 So. 157, which has also been considered.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 1, 1941.

Hon. B. G. Farmer,
Sheriff, Houston County,
Dothan, Alabama.

Sheriffs — Fees for collecting costs —

The Sheriff is entitled to $1.50 for collecting costs regardless of the amount of said costs.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of April 18, 1941, in which you request my official opinion, is as follows:

> "In the scale of fees of Sheriffs, it is provided that a Sheriff charge certain percentage on judgments, while it specifically states that an execution for costs allows the Sheriff a fee of $1.50. When execution for a judgment and cost is collected from a defendant and the 5% commission is less than $1.50, is a Sheriff entitled to then charge the fee of $1.50, inasmuch as he collects the judgment PLUS the cost?"

It is my opinion that the sheriff is entitled to a fee of $1.50 for collecting costs, and this is all he can receive for collecting this part of the judgment under execution. In other words, he gets no commission for collecting costs but receives a straight fee of $1.50.

I call your attention to Section 7287, Code of Alabama, 1923, as amended. This section sets out the schedule of fees and allowances which sheriffs may collect and is in part as follows:

"Collecting execution for costs only ..... $1.50."

I also wish to call your attention to that part of Section 7287, supra, which provides:

> "Collecting money under execution: For the first two hundred dollars, five per cent; for collecting all sums over two hundred dollars, up to and including five hundred dollars, four per cent; and for collecting all sums in excess of five hundred dollars, three per cent; **but no commission shall be collected on costs.**" (Emphasis supplied.)

You will see from the above that no commission can be collected on costs. Cf. Biennial Report of Attorney General, 1928-30, page 27.

Yours very truly,
THOMAS S. LAWSON,
Attorney General.

May 1, 1941.

Hon. H. E. Hendon,

Tax Assessor,

Macon County,

Tuskegee, Alabama.

Taxation — Assessments — United States of America —

1. Where title to real estate vested in the United States Government prior to October 1, 1939, such property is exempt from ad valorem taxation for tax year 1939-1940.

2. The assessment of such property by the former owner, or his guardian, does not make the same liable for taxation.

3. If such property is assessed, and the taxes on same are not paid, the same should be reported by the Tax Collector on his list of Errors in Assessments, and he should be allowed credit therefor.

4. If such property is assessed, and the taxes thereon are paid, the procedure for refund, if facts warrant same, is set out in Sections 296 et sequitur of the 1935 Revenue Act.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your requests for official opinion bearing date of January 11, 1941, follow:

"Re: Robert Dumas; Reuben Brown, Dr. H. H. Winters, Guardian.

"Please advise me as to the status of a charge made from the Tax Assessor's office to the Tax Collector's office on the following:

"On November 24, 1939 Robert Dumas assessed a ten acre tract on which condemnation proceedings had been instituted and the decree confirming the deed of Commissioner, dated September 2, 1939 had been recorded. Dumas had not received payment for the property and voluntarily assessed it.

"On December 28, 1939, Dr. H. H. Winters, as Guardian for Reuben Brown, assessed a tract of land which had the same record as the above mentioned. On this assessment the tract in question was in an assessment which included other property. The reason for its inclusion in the assessment was that payment had not been received for the property at the time of assessment.

"Enclosed are copies of the assessments of both of these parties, and a copy of the deeds in reference to the condemnation.

"Robert Dumas has not paid the taxes on the assessment made, and Dr. Winters asks that a deduction be made by the Tax Collector for the property condemned by the Government.

"Thanking you for a ruling on this, I am"

"Re: Gus Harris, George W. Warren.

"Enclosed are copies of the tax assessments of Gus Harris and George W. Warren for the tax year 1940. Both of these property owners assessed land on which condemnation proceedings had been instituted, and confirmed to the United States of America. Both of these property owners stated that they did not wish to accept the value placed by the Government, and wanted to assess the property in their name for the tax year 1940.

"George W. Warren paid his taxes on October 2, 1940. Gus Harris has not paid on the assessment which he insisted on making.

"Copies of the deed and decree confirming the deed to the Government are enclosed.

"Please advise me whether taxes should be collected on this property for the tax year 1940."

The questions involved in your requests concerning the assessments of Robert Dumas, Reuben Brown, by Dr. H. H. Winters, Guardian, Gus Harris and George W. Warren are so related that I shall proceed to answer all of these questions in one opinion.

I assume that the taxes about which you inquire are the taxes which were assessable as of October 1, 1939, and becomes due and payable October 1, 1940.

In regard to Robert Dumas and Reuben Brown, it appears from the commissioner's deed and the decree of the United States District Court confirming this deed that the title to the property therein described was vested in the United States of America on September 2, 1939, and it further appears from the decree of the District Court confirming this deed that the sum of $6,035 has been paid into the registry of the District Court, this sum being the gross award to Robert Dumas and Reuben Brown for the appropriation of the lands described in such deed.

In regard to Gus Harris and George W. Warren, it appears from the commissioner's deed and the decree of the United States District Court confirming this deed that the title to the property therein described was vested in the United States of America on August 10, 1939, and it further appears from the decree of the District Court confirming this deed that the sum of $3,050 has been paid into the registry of the District Court, this sum being the gross award to Gus Harris and George W. Warren for the appropriation of the lands described in such deed.

Your attention is called to the pertinent part of Subsection (a) of Section 2 of the 1935 Revenue Act, which reads as follows:

> "Section 2. PERSONS AND PROPERTY. The following property and persons shall be exempt from ad valorem taxation and none other; (a) All bonds of the United States and this State, And all county and municipal bonds issued by counties and municipalities in this State, all property, **real and personal, of the United States** *** " (Emphasis supplied)

You, of course, know that the lien for State taxes attaches as of October 1st of any given tax year for taxes due October 1st of the next year.

Due to the fact that the title to all the property owned by the parties here considered was vested in the United States Government prior to October 1, 1939, it is my opinion that this property would not be subject to assessment as of October 1, 1939 for taxes due October 1, 1940. The mere fact that some of these parties have seen fit to assess their property for the reason that they have not received payment for the same would not, in and of itself, subject this property to taxation.

In regard to the properties in question upon which the taxes have not been paid, you are advised that the tax collector should report such properties which were condemned by the United States Government, on his list of Errors in Assessments, as provided by Section 178 of the Revenue Act of 1935, and should be allowed credit for such assessments, as provided by Section 179 of the Revenue Act of 1935. The taxpayers should be required to pay all taxes assessed against all other property they might own, but should not be required to pay the taxes assessed against the property condemned by the United States Government, which, as pointed out above, should be reported on the list of Errors in Assessments.

As regards the Warren property, upon which the taxes have been paid, I wish to refer you to Sections 296 et sequitur of the Revenue Act of 1935, which provide for a refund of ad valorem taxes under certain circumstances. Whether or not the circumstances are such that this taxpayer may secure a refund of the taxes paid by him presents a question of fact which addresses itself to the proper officials, as set out in said section, and upon which this office cannot pass.

I am returning the copies of the several deeds, decrees of the District Court and assessment sheets which you enclosed in your original letters.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 1, 1941.

Hon. S. P. Poyner,

Judge of Probate,

Houston County,

Dothan, Alabama,

Counties — Airports — Leases —

1. Houston County is authorized to expend funds, together with the City of Dothan, for the acquisition of land in Dale County, to be used for the construction and improvement of an airport to be owned by them jointly.

2. Houston County is authorized, together with the City of Dothan, to lease such lands, so acquired, to the Federal Government, from year to year, for a period of years not exceeding 25, such lands during the period of such lease to be improved, by the use of Federal funds, as an airport, and to be used by the Federal Government for airport and other purposes.

Opinion by Assistant Attorneys General Screws and Garrett.

Dear Sir:

Your request for official opinion bearing date of April 18, 1941, is as follows:

"The City of Dothan and Houston County are desirous of acquiring land in Dale County for the purpose of the construction and improvement of an airport, said airport to be owned jointly by the City of Dothan and Houston County. Please advise me if Houston County, under the authority of the Municipal Airport Act, Act No. 136, H. 288, approved March 10, 1931 (General Acts, 1931, page 197), has the authority to expend its funds for this purpose.

"It is contemplated by the City of Dothan and Houston County that after this land is acquired, provided authority exists for the acquisition thereof, to lease the same to the federal government from year to year over a period of years not exceeding twenty-five, with the federal government having the option to renew the lease for another year at the end of each year during that time. If the same is leased to the federal government, it will expend federal funds for the improvement of this land as an airport and will use the same during the period or periods of the lease for airport and other purposes.

"If you hold that Houston County has the authority to expend its funds for the acquisition of this land, then please advise me if Houston County has the authority to enter into such a lease with the federal government."

In Section 2 of the Municipal Airport Act, a "municipality" is defined as including a "county."

Section 5 of said Act declares the construction, maintenance and operation of municipal airports to be a public governmental function.

Section 3 thereof provides as follows:

> "Section 3. MUNICIPAL AIRPORTS; AUTHORITY TO ESTABLISH. Each municipality of this State is hereby authorized to **acquire,** establish, construct, expand, own, control, equip, improve, maintain, operate and regulate **airports or landing fields for the use of airplanes and other aircraft, either within or without the geographical limits thereof."** (Emphasis supplied.)

The authority granted to municipalities, including counties, by Section 3, supra, may be exercised by a municipality, including a county, individually, or may be exercised by more than one municipality, including a county, jointly. See Section 16 of said Act.

Other sections of the Act provide the method for the acquisition of lands for such purposes.

By virtue of the above cited or quoted provisions of said Act, it seems very clear that Houston County has the authority to expend its funds, together with the City of Dothan, for the purpose of acquiring land in Dale County to be used for the construction and improvement of an airport, such airport to be jointly owned by the City of Dothan and Houston County.

Having decided that Houston County has the authority to expend its funds, together with the City of Dothan, for the acquisition of such land for such purpose, we come to the question of whether or not such lands, if so acquired, may be leased to the Federal Government from year to year over a period of years not exceeding 25, the Federal Government during the period of such lease to expend its funds for the improvement of this land as an airport, and to use the same for airport and other purposes.

While it is true that county governing bodies are creatures of the Legislature, and may exercise only such powers as are delegated to them by the Legislature (**Rhodes v. Marengo County Bank,** 205 Ala. 667, 88 So. 850), it is my opinion that the County Governing Body of Houston County is invested with authority to lease such lands to the Federal Government, according to the plan outlined in your letter of inquiry. As pointed out in answer to your first inquiry, such lands so acquired will be jointly owned by the City of Dothan and Houston County. Section 209 of the Code of Alabama, 1923, provides that the county governing body shall "have control of all property belonging to the county." Like authority is vested in the county governing body by Subdivision 1 of Section 6755 of the Code of Alabama, 1923, as amended. The Supreme Court of Alabama has held that this broad general power of control over the property of the county, vested in the county governing body, includes the right to lease the property of the county when, in the judgment

of the county governing body, the same is to the best interests of the county. **Jackson v. Ball,** 211 Ala. 273, 100 So. 327; **Corning v. Patton,** 236 Ala. 354, 182 So. 39.

The premises considered, it is my opinion that Houston County may join with the City of Dothan in the expenditure of funds for the acquisition of land in Dale County to be used for the construction and improvement of an airport, and that after such lands are thus acquired Houston County may, with the City of Dothan, lease the same to the Federal Government, according to the plan outlined in your letter of inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 2, 1941.

Hon. B. P. Singleton,

Chief Examiner of Public Aocounts,

Capitol.

Counties — Newspapers — Publications —

A county cannot legally publish, and pay for, notices of primary elections, list of county electors, meetings of Board of Equalization, and semi-annual financial statements in more than one newspaper in that county.

Opinion by Assistant Attorney General Mooneyham.

Dear Sir:

I have your letter of March 15, 1941, in which you request my official opinions as follows:

"In one of the counties of the State the Court of County Commissioners publishes notices of Primary Elections, List of County Electors, Meetings of the County Boards of Equalization and the County's Semi-Annual Financial Statement in two newspapers. These two papers, by agreement, only charge one half the regular rate and the publications in two papers cost only what would ordinarily be charged by one paper.

"In the light of the above, can a County legally publish notices of Primary Elections, List of County Electors, Meetings of the County Boards of Equalization and the County's Semi-Annual Financial Statements in more than one newspaper in the County, even though the total cost is not in excess of what the cost would be had the notices been published in one newspaper?"

In reply to your inquiry, I wish to advise that, in my opinion, a county cannot legally publish, and pay for, notices of primary elections, list of county electors, meetings of the Board of Equalization, and semi-annual financial statements in **more** than **one** newspaper in the county, even though the cost of such publishing would not exceed the cost of publishing it in only one newspaper.

Section 6766, Code of Alabama, 1923, is as follows:

> "6766. — Publication of receipts and disbursements. — The courts of county commissioners, boards of revenue or like governing bodies shall make a semi-annual publication on the first days of January and July of each year, in a newspaper published in the county, of an itemized report, showing the receipts and expenditures of money for the county, specifying particularly the sources from which received, and the purposes for which expended. Said application must also show the entire indebtedness of the county, of whatever kind and character, specifying particularly the amount of bonds outstanding, their character and when due; the amount of the outstanding warrants, whether interest-bearing or not, and if interest-bearing, the rate of interest, for what said warrants were issued and when due and payable."

It will be noted that, under the above section of the Code, it is mandatory upon the county governing body to publish its semi-annual financial statement **"in a newspaper published in the county."** The county is not required to publish it at any other time or in **more than one newspaper.**

Since this mandatory duty only includes publication in **one newspaper,** I am of the opinion that there is no authority to publish, and pay for, such statement in **more than one newspaper.** Section 9262, Code of Alabama, 1923, prescribes the maximum legal rate that may be charged for such notices, and as I understand the facts in your request, this is divided between the two newspapers which carried the publication of the notices. I am conscious of the fact that the county may not have suffered any financial loss by reason of having allowed two newspapers to publish the notices and divide the cost of the same between them. However, I know of no authority under which the county can legally do this. In doing so, the county governing body would exceed the duty required of it by law — that is, the duty of publishing such notices **"in a newspaper in the county."**

It should also be borne in mind that the rate prescribed in Section 9262 of the Code is the maximum rate and that it would be the duty of the county governing body to get the financial statement published for less, if possible. In fact, it might be inferred from the statements made in your inquiry, that one-half of the rate specified in Section 9262 is a reasonable and fair price to be charged for publishing such notices, and that, as a result, the county should only authorize publication in **one newspaper at such rate.**

What I have said in reference to publishing semi-annual financial statements of counties is applicable to publishing notices of primary elections, list

of county electors, and meetings of the county Board of Equalization. Consequently, there is no need for a separate discussion of the law as to each of these.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 5, 1941.

Hon. A. R. Forsyth,

Director of Finance,

The Capitol.

Conditional Appropriations — Budget — Department of Conservation, Division of Forestry — Property —

1. Subdivision 12, Subsection XIII of Section 1, General Appropriation Act of 1939 (General Acts, 1939, p. 411) appropriating monies for the purchase of lands in Calhoun County to connect Fort McClellan with the National Forest, construed and discussed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion dated December 16, 1940, follows:

"The General Appropriation Act, being No. 247, Acts of 1939, page 411, carries the following appropriation on page 418:

" '12. Purchase of land to connect Fort McClellan with the National Forest; For the purchase of land in Calhoun County to connect Fort McClellan with the National Forest, conditional upon the approval of the Governor, and only when such appropriation will not result in the proration of other appropriations, $150,000.00 only, during the four-year period. Provided, however, that, subject to the conditions herein above, said $150,000.00 may be made available for expenditure in whole or in part during any fiscal year of the quadrennium.'

"I respectfully request that you give me your official opinion as to the following questions:

"1. It is proposed to release $50,000.00 of this appropriation immediately. If the Governor approves the release of $50,000.00 of this appropriation at this time, would the proviso in the above quoted excerpt to the

effect that said appropriation is made 'only when such appropriation will not result in the proration of other appropriations' prevent the release of said $50,000.00 immediately?

"2. To whom and in what manner shall such appropriation be paid?

"3. What form of indenture shall be taken to evidence the conveyance of title to the State?"

I am of the opinion that your first inquiry should be answered in the negative, provided the State's "budget" for the present fiscal year affirmatively shows that such release will not result in the proration of other appropriations. The "budget" being essentially an "estimate" and prospective in operation, it will not be necessary to wait until the close of the fiscal year to determine the condition precedent of non-proration of other appropriations before the release of the appropriation in question can be made. This condition may be determined at this time.

The appropriation in question (Subdivision 12, Subsection XIII of Section 1, General Appropriation Act of 1939, General Acts, 1939, p. 411) is an appropriation for the purchase of certain property by the State, subject to two main conditions: (1) the approval of the Governor, and (2) that such will not result in the proration of other appropriations. The appropriation here is analogous to those dealt with in the cases of **Southern Industrial Institute vs. Lee**, 234 Ala. 404, 175 So. 365, and **In re Opinion of the Justices**, 234 Ala. 555, 176 So. 367, respectively.

In the Southern Industrial Institute case the appropriation there considered was made available only upon approval of the Governor, and subject to his judgment as to the condition of the treasury. The expenditure of the appropriation in the In re Opinion of the Justices case was dependent upon the approval of the Governor, the Chief Justice and the Attorney General, and that the condition of the State Treasury justified the same. The Court, in the Southern Industrial Institute case, (which case was followed in the In re Opinion of the Justices case), observed:

"We are acquainted, as a matter of common knowledge, with the history of the Budget Act, the large outstanding floating debt of the state, the insufficiency of funds in the treasury, and appropriations far in excess of the state's revenues. The act was designed to make the state operate within its income. To that end, there was vested in the Governor direct and effective supervision over all of the state's financial affairs. See Section 2 of the act, and Abramson v. Hard, 229 Ala. 2, 155 So. 590.

"The appropriation here in question is in harmony with that theory, as its release is wholly dependent upon the will of the Governor, who, under the Budget Act, has direct supervision over the state's finances."

In the case of **Baker vs. Singleton**, 237 Ala. 394, 187 So. 478, it was held that the word "budget," being essentially an "estimate," the budget set up by the Governor and the Comptroller (now the Director of Finance) for the various departments of State was necessarily prospective in operation.

The foregoing leads me to the conclusion that if the Governor approves the release of the appropriation in question, or a part thereof, and the condition of the treasury, as shown by the "budget" adopted for the present fiscal year, is such that the release of the amount approved will not result in the proration of other appropriations, said amount may be released immediately. The "budget" being essentially an "estimate" and prospective in operation, it is not necessary to wait until the close of the fiscal year to determine the condition precedent of non-proration of the other appropriations. This fact may be ascertained by estimate. The proviso that the appropriation in question "may be made available for expenditure in whole or in part during any fiscal year of the quadrennium" strengthens the above conclusion. The words "during any fiscal year," rather than "at the end of any fiscal year," are used.

In answer to your second inquiry, it is my opinion that the appropriation should be released to the Department of Conservation, Division of Forestry, and administered by said Department for the purpose of purchasing land in Calhoun County to connect Fort McClellan with the National Forest. Section 989 of the Code of Alabama, 1923, relative to the duties of the State Forestry Commission (now under the Department of Conservation), as last amended by Act No. 161, S. 140, approved March 2, 1937, (General Acts, 1936-37, p. 183) provides in pertinent part as follows:

"§989. *** The Commission for the purpose of establishing, developing and maintaining State Forests and State Parks and Parkways, may acquire land by donation, purchase, condemnation or lease, and for these purposes may use such funds as may be available to it and not otherwise obligated, and may enter into agreements with the Federal Government or other agencies for acquiring by lease, purchase or otherwise such lands as in its judgment are desirable for State Forests or State Parks or Parkways. As to the purchase of lands, such agreements may provide for a division of the payments over a period of years in which case the payments may be secured by mortgage, provided that no liability shall attach to the State of Alabama or any of its departments, boards, bureaus or commissions, or any member or official thereof, if the security specifically given in any such mortgage is insufficient to pay said mortgage at a forced sale or otherwise. When lands are acquired or leased under this Section, the Commission is authorized to make expenditures from any funds not otherwise obligated for the management, development and utilization of such areas; to sell or otherwise dispose of products from such lands, and shall have sole charge of all State Forests and State Parks and Parkways and shall have authority to make such rules and regulations for the management, administration, occupancy and use of said State Forests and State Parks and Parkways, and all property and things of whatsoever nature therein or thereon, as it shall find necessary.

* * * * * *

"The Commission shall have full power and authority to sell, exchange, or lease lands under its jurisdiction when in its judgment it is advantageous to the State to do so in the highest orderly development and management of State Forests and State Parks and Parkways; provided, however, said sale, lease or exchange shall not be contrary to the terms of any contract which it has entered into."

See also Act No. 556, S. 436, approved September 22, 1939 (General Acts, 1939, p. 877).

The act making the appropriation is silent as to the administration thereof. It must be presumed that the legislature intended that it should be administered through a department of the State Government authorized to purchase land for the purpose in question. The purpose of the purchase under the literal terms of the appropriation is to connect Fort McClellan and the National Forest. It is logical to assume that it was intended the land so purchased be for the purpose of establishing, developing and maintaining State Forests and for State Parks and Parkways under Section 989 of the Code of Alabama, 1923, as amended, supra. To hold otherwise would impute to the legislature the doing of a useless thing as there is no other department of the State Government authorized to administer the appropriation in question.

In answer to your third question, it is my opinion that no particular form of indenture need be taken by the State, provided the provisions of Section 989, as amended, supra, are met. The grantee in the instrument should be the State of Alabama for the use and benefit of the Department of Conservation, Division of Forestry. I suggest that an examination of the title be made and a warranty deed required.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 5, 1941.

Hon. J. A. Posey,
County Attorney,
Winston County,
Haleyville, Alabama.

Winston County — Examiner of Accounts —

Expense of auditing accounts of Winston County Highway Board held proper charge against General Fund of the County.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of April 14, 1941, in which you request my official opinion as follows:

"As attorney for the Commissioners' Court of Winston County, Alabama, I request an opinion from you on the following proposition:

"A local bill was passed during the last session of the legislature creating a Highway Board for Winston County — Local Acts of Alabama, 1939, page 221 — and defining its scope of activity.

"When the records and books of the Highway Board are examined can the expense of the audit be paid by the Highway Board out of gas tax funds in their hands? or must it be paid by the Court of County Commissioners out of the general fund of the County?

"An early opinion on this question will be greatly appreciated."

In reply I wish to advise that, in my opinion, the expense of the audit named in your request is a proper charge against the county and should be paid from the general fund of the county.

Act No. 333, H. 815, approved September 5, 1939 (Local Acts, 1939, page 221), which creates the Highway Board of Winston County, makes no provision for the payment of expenses of auditing the accounts therefor.

Since the Local Act creating the said Highway Board of Winston County is silent on the question under consideration, it is my judgment that reference must be made to the general law of authority to pay the expenses here contemplated.

Act No. 218, H. 255, approved July 17, 1935 (General Acts, 1935, page 601), appearing as Section 752(3) of Michie's 1936 Cumulative Supplement to the Alabama Code of 1928, provides as follows:

"752(3). Same. — The division of departmental and county audits is hereby required to examine the records of each county officer in every county in this state at least once every two years and when said examination shall have been completed no subsequent examination for the period covered shall be made at the expense of the county.

"The governor is hereby authorized to appoint assistant examiners in addition to those now authorized by section 739 of the code of Alabama of 1923, sufficient in number to secure the enforcement of this act and said examiners shall have the same authority, be paid the same compensation and be governed by all the rules prescribed by chapter 24 of the code of Alabama of 1923 and all the amendments thereto.

"Where the state is not interested in the examination or where the examination refers altogether to a county examination, the board of revenues or commissioners court of the county shall pay out of general funds of the county the expense of examination, but if the examination is of matters belonging to the state and the county then the state and county are each to share their prorata share of the expense of examination to be determined by the comptroller with the approval of the governor, and if the examination is a matter belonging or appertaining to the state alone then the state shall pay all the expenses of examination."

Section 749 of the Code of 1923 provides as follows:

"749. Expense account against county; how audited and paid.—Immediately after the completion of an examination of the several county officers, which shall be made at the same time that examinations are made for the state, the examiners making such examination shall make out an account under oath, for and in the name of the state, against said county, for approximately the number of days engaged in the county examination for such county at the same rate of pay and expense allowed for state work, and file the same with the clerk of the board of revenue, court of county commissioners or courts of like jurisdiction of said county, and also file a duplicate thereof with the state auditor, and the state auditor shall thereupon draw his warrant upon the county treasurer for said amount, and the county treasurer, immediately upon receipt of the auditor's warrant, shall pay the said amount into the state treasury out of the first county funds coming into his possession."

You will note that the above quoted provisions of law require the county to pay the expenses of the audit of county officers out of the general fund of the county insofar as the audit concerns, and is made for the benefit of, the county.

I wish to refer you to the case of **State v. Tuscaloosa County,** 233 Ala. 611, 172 So 892, in which Mr. Justice Bouldin, writing to the question at issue here, says:

"Section 749 does not contemplate refunding to the State the expense of examining records of 'county officers,' but only for the time engaged 'in the county **examination for such county.**'

* * * * * *

"Section 749, quite clearly, we think, contemplates a reimbursement of the State by the county, out of funds in the county treasury, for only such portion of the State outlay as is incurred in examinations 'for the county,' for the safeguarding of county funds, and not for examinations safeguarding funds of the State or its agencies devoted to State enterprises *** ." (Emphasis supplied)

It is significant that our Supreme Court, in the case above quoted, has pointed out in an unmistakably clear manner that the county's liability for the expense of examination or audit of the records of "county officers" is subject to the provision that such examination shall be made of county funds and for the benefit of the county.

In my judgment, the funds of the Highway Board of Winston County are county funds. It must, therefore, follow that an examination of the books and records of the Highway Board of Winston County by the Division of Examiners of Public Accounts of the State of Alabama is made for the ben-

efit of Winston County, and in my opinion, the expense of the said examination must necessarily be paid from the General Fund of Winston County. Cf. Quarterly Report of Attorney General, Volume XVI, page 170.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 6, 1941.

Hon. I. C. Heck,
State Comptroller,
Capitol.

Costs and Fees — Sheriffs — Extradition —

Where a defendant charged with a felony flees to another state and his return to this state is effectuated without the issuance of extradition papers, he must be convicted of a felony before the State will pay the costs of his return. (Section 3742, Code of 1923).

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 1, 1941, in which you request my official opinion as follows:

"We would like to have your official opinion with reference to fees and expenses of Sheriffs returning criminals to the State without requisition.

"What we would like to know is this: Does the State pay for removal of a prisoner from another State, who without the Governor's requisition, is returned by the Sheriff of the county in which the crime was committed to this State for trial, when the prisoner is charged with a felony but is convicted of a misdemeanor?

"We refer to Section 3742 of the Code of Alabama, 1923, a part of which reads:

"'But this section shall apply only to felonies, and only where conviction of the party or parties is had.'

"Would this be interpreted as meaning 'conviction of a felony?'

"We refer you to the Biennial Report of the Attorney General, 1934-

36, page 561; Biennial Report of the Attorney General, 1936-38, page 293; Quarterly Report of the Attorney General, Volume 14, page 247, and Attorney General's opinion on April 10, 1941, to Hon. Robert M. Hill, Associate Member of the State Board of Pardons and Paroles."

My answer to the above is in the negative. I refer you to Section 3742, Code of Alabama, 1923, which is as follows:

"§3742. Criminal returning to state without requisition; fees of sheriff.—In cases where any sheriff in this state receives notice from the authorities in another state that a party or patries is or are arrested for crime committed in this state, and the sheriff of the county in which said crime was committed goes to the state aforesaid and the party or parties aforesaid consents to return with the said sheriff without requisition from the governor, said sheriff shall be entitled to the fees and expenses now provided by law where requisitions issue. But this section shall apply only to felonies and only where conviction of the party or parties is had."

You will note the above section says in part: "But this section shall apply only to felonies, and only where conviction of the party or parties is had." This, in my opinion, means the defendant must be charged with a felony and convicted of the same (a felony) before the State will pay for his return from another state, where the return to this this state is effectuated without the issuance of requisition papers. Biennial Report of Attorney General, 1934-36, page 561; Opinion of Attorney General to Associate Member of State Board of Pardons on April 10, 1941 (Copy enclosed).

The opinion of this office found in Biennial Report of Attorney General, 1936-38, at page 293, is not in conflict with the above, as said opinion dealt with a situation where requisition papers were issued.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 9, 1941.

Hon. B. P. Singleton,
Chief Examiner of Accounts,
Capitol.

Randolph County — Fine & Forfeiture Fund — Payment of fines in scrip —

Fines and forfeitures due and payable to Randolph County may be paid in registered claims against the Fine & Forfeiture Fund of said County, without regard to the priority of registration.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of April 23, 1941, in which you request my opinion as follows:

"Please refer to Local Acts of 1900-01, Act 428, page 1094 and advise me in answer to the following question.

"Would claims that are legally chargeable against the Fine & Forfeiture Fund of Randolph County **have to be registered** against this Fund before they could be accepted by the Circuit Clerk in payment of fines and forfeiture?

"In connection with this request, and for what it may be worth, I doubt if this Local Act is constitutional in the light of Section 303, Sub-Section 523 (sic.), Code of Alabama. However, not being concerned with this angle, it is the general rule and law that the custodian of a fine and forfeiture fund is responsible for the validity and/or legality and/or correctness of claims registered for payment and I do not quite see how the law could properly operate other than to require the Circuit Clerk to accept only registered claims in the payment of fines and forfeiture. It might be of interest to you to refer to ruling of your office on page 763, Biennial Report 1928-30."

The Clerk of the Circuit Court of Randolph County, on April 30, 1941, presented the following inquiry to this office in connection with the Local Act under consideration, which will be incorporated as a part of this request:

"Please refer to an act approved February 14, 1901, (copy enclosed) relative to the payment of fines and forfeitures in fine and forfeiture scrip in Randolph County, Alabama, and advise whether or not it is legal to accept any legally registered scrip in payment of said fines and forfeitures or should only those registered claims in order of priority be acceptable?"

In answer to the inquiry presented by you, I am of the opinion that before claims against the Fine and Forfeiture Fund of Randolph County can be accepted in payment of fines and forfeitures due the county the same would have to be registered.

The local act under consideration is Act No. 428, H. 957, approved February 14, 1901 (General & Local Acts, 1900-01, page 1094). Said Act provides as follows:

"No. 428) AN ACT (H. 957

To regulate the payments of fines and forfeitures, and the disbursement of such fines and forfeitures in Randolph County, Alabama.

Section 1. Be it enacted by the General Assembly of Alabama, That all fines and forfeitures due and payable to Randolph county, may be paid

in claims that are legally chargeable against such fine and forfeiture fund.

SEC. 2. Be it further enacted, That claims of officers of the court against said fine and forfeiture fund which have heretofore accrued or may hereafter accrue and which have already been legally registered against such fund or which may hereafter be legally registered against such fund, shall be equal with the claims of State witnesses against said fund and shall be payable in the order of their registration on the books of the county treasurer.

SEC. 3. Be it further enacted, That all laws and parts of laws in conflict with the provisions of this act so far as relates to Randolph county be and the same are hereby repealed.

Approved February 14, 1901."

It will be seen from Section 1 of the above quoted Act that claims legally chargeable against the Fine & Forfeiture Fund of Randolph County may be accepted in payment of fines and forfeitures due and payable to said County. Before a claim is legally chargeable against said Fine & Forfeiture Fund, it is my opinion that said claim must be registered. Cf. **Mimms v. State,** 180 511, 61 So. 811. (See Section 303(5), Code of Alabama, 1923.) This view is strengthened by the fact that under Section 2 of the above quoted Act registration of claims is provided for in order to place the claims of officers on a parity with those of witnesses.

In answer to the question presented by the Clerk of the Circuit Court of Randolph County, it is my opinion that all registered claims against the Fine & Forfeiture Fund of Randolph County may be accepted in payment of fines and forfeitures due and payable to said County, without regard to the priority of registration. Section 2 of the Act could not, in my judgment, be interpreted to mean that the order of priority of registration should prevail in regard to the acceptance of scrip in payment of fines and forfeitures due the County. Said Section merely places registered officers' claims on a parity with registered witnesses' claims. Cf. **Quarterly Report of Attorney General,** Vol. XXI, page 223.

The opinion in the Biennial Report of the Attorney General, 1928-30, page 763, to which you refer, does not affect the above. In regard to the present applicability of local acts similar to the one under consideration, which were enacted prior to the adoption of the Constitution of 1901, I wish to refer you to the case of **Reid v. Wallace,** 27 Ala. 199, 168 So. 900.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 9, 1941.

Hon. T. M. Perry, President,
Marengo County Board of Revenue,
Linden, Alabama.

Counties — Marengo County —

The employment of the clerk, bookkeeper, and other clerical assistance to the Board of Revenue of Marengo County is governed by Section 7 of Act No. 311, H. 904, approved September 9, 1923, (Local Acts, 1923, page 188), as amended by Act No. 259, H. 628, approved November 8, 1932 (Local Acts, 1932, page 107). The same is not affected by the County Financial Control Act.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion under date of April 8, 1941, is as follows:

"Does the Financial Control Act of 1935 Section 8 & 8½ Sec. 19, repeal or effect the local act of 1923 amended 1927 which creates the Board of Revenue of Marengo County as to Section 5 & 7 thereof.

"The intent of this opinion is to clarify who has the authority to hire the Clerk, bookkeeper and other clerical assistance as may be needed by the Marengo County Board of Revenue."

In answer to your inquiry, I am of the opinion that the hiring of the clerk, bookkeeper, and other clerical assistance to the Board of Revenue of Marengo County is governed by Section 7 of Act No. 311, H. 904, approved September 9, 1923 (Local Acts, 1923, page 188), as amended by Act No. 259, H. 628, approved November 8, 1932 (Local Acts, 1932, page 107). Said section, as amended, provides as follows:

"Section 7. That said Board of Revenue shall elect a Clerk, and fix his compensation, and employ such other clerical assistance as may be necessary, and it shall be the duty of the Clerk of the Board of Revenue to attend the meetings thereof and issue all notices required by it. The Clerk shall, under the direction of said Board of Revenue, keep the minutes and records of the proceedings thereof, in well bound volumes provided for that purpose, said records to be kept in the office of the Board of Revenue, and to be open at all reasonable hours to the inspection of the citizens of the county and other interested persons; and the Clerk shall perform such other duties and matters as may be required of him by said Board of Revenue. The compensation of said Clerk and of all other clerical assistants shall be fixed by said Board of Revenue and their terms of office shall be at the pleasure of said Board of Revenue. That before entering upon the discharge of his duties said Clerk shall take the same oath as the members of said Board of Revenue are required to take, and shall give a good and sufficient bond, with good and sufficient surety, payable to the County of Marengo, in such amount as may be fixed and prescribed by said Board of Revenue, which bond shall be filed with and

approved by the Judge of Probate of Marengo County, with conditions faithfully to discharge the duties of such office during the time he continues therein or discharges any of the duties thereof, the premium on said bond to be paid out of the County Treasury on certificate or warrant signed by the President or President pro tem of said Board of Revenue. That said Clerk shall keep a record of every warrant, claim, draft or certificate issued by or under the authority of the Board of Revenue, showing the date, amount and to whom and for what issued, and shall countersign the same, and shall also keep a record of all notes, bonds, contracts or agreements made, given or issued by or in the name of Marengo County, showing the date, amount, object and purpose thereof, and to whom given and for what purpose made or issued, and counter-sign the same; and said Clerk shall also, under the direction, supervision and control of said Board of Revenue, install and keep a general set of books showing the true and correct financial condition of Marengo County and the income thereof, the source from which derived, how or in what way the same is paid out and expended, and an itemized account of each fund handled, expended or controlled by said Board of Revenue and in what way the same is paid out and disbursed; and at the September meeting each year of said Board of Revenue said Clerk shall make up and file with it a detailed estimate and statement of the income from each fund for the coming fiscal year, and a detailed statement of the fixed expenses and charges against each of said funds."

The provisions of the above quoted section are not affected by Act No. 379, H. 191, approved September 9, 1935 (General Acts, 1935, page 803), known as "The County Financial Control Act," in view of Section 19 thereof, which provides as follows:

"Section 19. **Repeals conflicting laws.** All laws and parts of laws, except local acts applying to single counties, conflicting with any of the provisions of this Act be and they hereby are repealed."

This is true, in my opinion, notwithstanding Section 5 of the Local Act, which provides as follows:

"Section 5. That all General Laws hereafter enacted in relation to the jurisdiction, powers, authority or duties of the county commissioners shall apply to and govern the Board of Revenue of Marengo County."

Section 19, supra, is the last expression of the legislature and supersedes the provisions of Section 5, supra. Said Section 5 would result in a different conclusion if it were not for the provision of Section 19 of the County Financial Budget Control Act.

In view of the above, an opinion of this office rendered to the Judge of Probate of Houston County under date of December 16, 1939 (Quarterly Report of Attorney General, Volume VIII, page 246), is not applicable to Marengo County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 12, 1941.

Hon. John C. Curry,
Commissioner of Revenue,
Capitol.

Licenses — Carbonic Acid Gas —

"Dry ice," sold or used exclusively for the purposes of a refrigerant, does not come within the purview of Schedule 31 of Section 348 of the Revenue Act of 1935, which levies an excise tax on persons selling, distributing and/or using carbonic acid gas or any substitute therefor.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of May 6, 1941, in which you request an official opinion, is as follows:

"Re: Schedule 31, Section 348 of the General Revenue Act of 1935. (Excise tax on carbonic acid gas)

"In the administration of the provisions of Schedule 31 of Section 348 of the General Revenue Act of 1935, among other questions which have arisen in the question whether or not the excise tax imposed by such Schedule applies upon the sale or use of carbonic acid gas or carbon dioxide when frozen or solidified and sold or used solely for the purpose of a refrigerant. The carbonic acid gas or carbon dioxide when so frozen or solidified is commonly referred to as 'dry ice.'

"It appears that during the previous Administration 'dry ice,' when sold and used solely for purposes of a refrigerant, was construed by the State Tax Commission and the administrative officials as not being subject to the excise tax imposed under Schedule 31. However, this Department has recently announced a change in the construction of this Schedule to include 'dry ice' whether used for bottling purposes or for any other purpose, including the use thereof as a refrigerant.

"On information submitted to the Department, it is claimed that the tax imposed would prohibit the use of 'dry ice' as a refrigerant, and it is insisted that such such construction is contrary to the legislative intent.

"I shall, therefore, thank you to render this Department an official opinion as to whether or not such produce commonly referred to as 'dry ice,' when sold or used exclusively for the purposes of a refrigerant, is subject to the excise tax imposed by Schedule 31."

I am of the opinion that your inquiry should be answered in the negative. Schedule 31 of Section 348 of the Revenue Act of 1935 provides in pertinent part as follows:

"Schedule 31. Each person selling, distributing and/or using carbonic acid gas or any substitute therefor, for any purpose, shall pay a privilege tax equal to two cents on each pound of carbonic acid gas or any substitute therefor sold, distributed and/or used. *** "

Your inquiry presents a consideration of the question as to whether or not carbonic acid gas or any substitute therefor, as used in Schedule 31, supra, includes "dry ice as a refrigerant."

"Carbonic acid gas" is carbon dioxide or CO_2 — Webster's New International Dictionary.

"Dry ice" is carbon dioxide, or CO_2 in solid form. At ordinary temperatures, CO_2 is in gaseous state, but by applying pressure, it may be liquefied and in turn solidified. At normal temperatures, dry ice changes from solid to gas, and increasingly so when placed in water and agitated. In transition from solid to gas, its volume increases 500 times. **New York Eskimo Pie Corporation v. Rataj,** C. C. A. Pa., 73 F. 2nd. 184, 186.

Carbonic acid gas, being a gaseous substance, and "dry ice" being a solid, I do not think that "dry ice" can be considered as carbonic acid gas within the meaning of the above schedule. Cf. **Carbo-Frost v. Pure Carbonic,** C. C. A. Mo., 103 F. 2nd. 210, 213. The question then presents itself as to whether or not "dry ice as a refrigerant" comes within the category of a substitute for carbonic acid gas. In my judgment this question should be answered in the negative. When "dry ice" is used as a refrigerant it does not, in my judgment, become a substitute for carbonic acid gas within the contemplation of said schedule. Its use as a refrigerant is confined to its use in solid form, and not to its possible convertible state into a gaseous substance.

The above conclusion is in accordance with the administrative construction of the previous administration, as shown by your letter. With this administrative construction placed on said statute, the Legislature adopted Schedule 31, supra, as Section 481 of Title 51, in the Code of Alabama, 1940, thus apparently adopting the legislative construction placed on said schedule by the previous administration. See: **State v. H. M. Hobbie Grocery Co.,** 225 Ala. 151, 142 So. 46; **Alabama Public Service Commission v. Jones,** 236 Ala. 310, 182 So. 452; **Marie Walker Jones v. Roy Johnson, Tax Assessor,** (Supreme Court) 199 So. 539. This is true, although the said administrative construction was recently changed. Though you do not state when the same was changed, I assume that it was changed after the adoption of the Code of Alabama, 1940.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 13, 1941.

Hon. D. Hardy Riddle,
Judge of Probate,
Talladega County,
Talladega, Alabama.

Revenue Act, 1935, Section 348, Schedule 142 — Licenses — Bunk Houses —

Establishments known as "bunk houses" subject to license under Schedule 142 of Section 348 of the Revenue Act of 1935, where such establishment furnishes temporary lodging for guests staying an indefinite length of time.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion bearing date of May 7, 1941, follows:

"We are confronted with the problem of what privilege license, if any, to issue for what are commonly called 'bunk houses'.

"These 'Bunk houses' are mostly long, one story, temporary wooden frame buildings, built so as to accommodate a line of cots down each side with a separating wall down the middle against which are built lockers for the use of the guests. Mostly built to accommodate from 25 to 150 guests, who will work at the defense projects in this county. The dividing wall may or may not be built completely to the ceiling of the room, and the entrances are one door at each end, making the building practically one room, or if it is two story, two rooms. The guests may stay a few days or several months.

"We have been issueing these people tourist camp licenses, which was our understanding was what was required. The question has now been raised that they are entitled to hotel licenses.

"Since this is a question of immediate importance to this office I will appreciate a ruling from you as to just what license these people are required to take out, if any. If you will please compute the amount required under your ruling for a 'bunk house' with a capacity of 100 guests. Also please rule on the question of where there are several bunk houses in one location under one management, or ownership, whether they shall take out license, one license, for all of them or separate license for each one (each building).

"I will appreciate a ruling on this matter just as soon as convenient, because we are being called on for the license at the present time."

In my opinion, the establishments above referred to and described as bunk houses are subject to license under Schedule 142 of Section 348 of the

Revenue Act of 1935 (General Acts, 1935, pp. 256, 498). Under this schedule the license is measured by the number of beds constituting the establishment and where there are more than fifteen beds, the amount of license would be, according to the schedule, $35.00 plus "one dollar ($1.00) for each additional bed over fifteen," thus amounting to $120.00.

I am of the opinion also that where several bunk houses in one location are operated under one management or ownership, they should be licensed as a unit by taking the aggregate number of beds of the different houses as a basis of calculation.

This same subject was considered in a former opinion of this office to Hon. Eugene B. Henry, Commissioner of Licenses, Jefferson County, Birmingham, Alabama, dated December 6, 1938 (Quarterly Report, Attorney General, Vol. XIII, page 105), from which it will be seen that in applying Schedule 142, supra, substance rather than form is to be considered; and, if in fact the business is operated as a public tourist camp, as defined in the schedule, it is subject to the license thereby imposed no matter by what name the business is designated.

I am also of the opinion that so-called bunk houses should not and cannot legally be licensed as hotels or lodging houses, as provided by Schedule 74 of Section 348 of the Revenue Act, supra, (General Acts, 1935, pp. 256-464). Under the latter schedule, the license is measured by the number of beds used for lodging guests rather than the number of beds, so that it will readily be seen that in the present instance the bed rather than the room should be taken as a unit.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 13, 1941.

Hon. J. M. Moore,
Judge of Probate,
Fayette County,
Fayette, Alabama.

Counties — Labor — National Youth Administration —

County authorized to appropriate funds to a project sponsored by the National Youth Administration, whereby a building will be constructed, jointly with a city therein, for the purpose of conducting a resident youth training center or vocational school to instruct the youth of the county in such subjects as woodcraft, sheet metal work and the use of welding apparatus, etc., and incidentally used as shops for the purpose of repairing and maintaining road equipment of the county.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of April 23, 1941, in which you request an official opinion, is as follows:

"The County and City of Fayette are interested in sponsoring a National Youth Administration project in Fayette County. The National Youth Administration has agreed to furnish $150,000 or more to be used for the purpose of constructing and equipping buildings, shops and similar structures on land owned jointly by the above named political subdivisions. The Administration then proposes to lease from the political subdivisions the land and buildings thereon, to be used for the purpose of conducting a resident youth training center, or vocational school, to instruct the youth of Fayette County in such subjects as woodcraft, sheet metal work and the use of welding apparatus, etc.

"In order for this project to be located in Fayette County, it will be necessary for the sponsors to cooperate with the National Youth Administration by supplementing the said sum of $150,000 for the purpose of constructing the necessary buildings, shops and similar structures.

"In addition to the benefits which the youth of Fayette County will receive from the instruction gained in this school, I would also like to call your attention to the fact that the sponsors will have the privilege of using these shops for the purpose of repairing and maintaining trucks, road equipment and other properties of the said political subdivisions.

"I would appreciate your opinion as to whether or not Fayette County may legally appropriate money for the above named purposes."

I am of the opinion that your inquiry should be answered in the affirmative. Subdivision 23 of Section 6755, Code of Alabama, 1923, as amended (Code of 1940, Title 12, Section 12) provides as follows:

"§6755. Authority of Court. — The court has authority — *** 23. To set aside, appropriate and use county funds or revenue for the purpose of developing, advertising, and promoting the agricultural, mineral, timber, water, **labor,** and all other resources of every kind of their respective counties, and for the purpose of locating and promoting agricultural, industrial, and manufacturing plants, factories and other industries in their respective counties." (Emphasis supplied)

In construing the above in connection with the promotion with the promotion of agriculture, this office has held that a county may appropriate its funds in connection with the construction of a clubhouse to be used by certain agricultural clubs within the county. — See Quarterly Report of Attorney General, Volume XX, page 51, and also opinions cited therein. Reasoning by analogy and based on the authority of the above cited opinion, it is my judgment that the county may appropriate its funds for the project outlined in your letter of inquiry, the same being for the purpose of promoting labor.

The primary purpose of the building in question being to conduct a resident youth training center or vocational school to instruct the youth of Fayette County in such subjects as woodcraft, sheet metal work and the use of welding apparatus, etc., in my judgment, brings the project within the meaning of the above quoted section in so far as the promotion of labor of the county is concerned.

The fact that the building will be owned jointly by Fayette County and the City of Fayette does not affect the situation. — Quarterly Report of Attorney General, Volume XXII, page 145.

Moreover, it appears that part of the building will be used incidentally as shops for the purpose of repairing and maintaining county trucks, road equipment and other properties. This being true, the county would have authority to make an appropriation out of its gasoline or road and bridge funds to the extent of the benefit it would derive from this phase of the project. — Quarterly Report of Attorney General, Volume XX, page 238.

The Code of 1940 is cited in view of the fact that said Code will become effective May 31, 1941.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 13, 1941.

Hon. Jas. T. Beeland,
Judge of Probate,
Butler County,
Greenville, Alabama.

Schools and School Districts — Taxation — Elections —

The fact that special county tax of three mills for public school purposes is being levied and collected, and will continue to be levied and collected, until September 30, 1947, pursuant to an elections previously held, does not prevent the holding of another election at this time on the question of whether or not such tax shall be levied and collected for a period of fifteen years from September 30, 1947, at which time the levy of the tax under the previous election will expire.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of April 23, 1941, is as follows:

"On May 13th, 1924, an election was held in this County for the purpose of levying a county wide three-mill school tax for a period of twenty

years 'beginning with and including the tax year 1927-28 and ending with and including the tax year 1946-47.' The election carried and the tax was levied, and is being levied and collected. A petition has now been filed with the Commissioners Court of this County signed by 200 or more qualified electors requesting that a special election be held on May 20th of this year for the purpose of levying a county wide three-mill school tax 'for a period of fifteen years from September 30, 1947'.

"Your office has previously held that an election cannot be called for the purpose of revoting a county three-mill school tax before the expiration of the period for which the tax is already being levied.

"O. A. G. 1928-30, page 290

O. A. G. 1926-28, page 449

O. A. G. Office Edition 4-A, page 45.

"Since the opinions referred to were rendered by your office the Legislature has passed an Act by which it is provided that elections for the purpose of voting special taxes for school purposes may be held for one or more of the following purposes:

"2. Voting such tax for a period additional to the period for which the tax then being levied has been voted. Acts 1939, page 334 (Section 20 page 344)

"In view of the Act above referred to, please advise whether an election may be called in pursuance of the petition now pending with the Commissioners Court of this County."

As I understand your letter of inquiry, a petition has been filed with the county governing body of your County in accordance with the provisions of Section 261 of the Alabama School Code of 1927, requesting that an election be ordered by your body to be held on May 20, 1941, for the purpose of ascertaining whether or not a special county tax of three mills for public school purposes, authorized by Amendment Number Three to the Constitution of Alabama, shall be levied in said County for a period of fifteen years from September 30, 1947. This Amendment to the Constitution provides for the levying of such a tax of not exceeding three mills for such purposes "provided, that the rate of such tax, the time it is to continue and the purpose thereof shall have been first submitted to the vote of the qualified electors of the county, and voted for by a majority of those voting at such election."

You state that such a special county tax of three mills is now being levied and collected, and will continue to be levied and collected, in your County, for public school purposes, until September 30, 1947, pursuant to an election previously held in your County, at which a majority of the qualified electors of your County voting at such election voted in favor of the same being levied and collected for such period. No question is raised as to the validity of that election, and for the purpose of this opinion, it may be assumed that the same was legally and validly held, and that the tax now being levied and collected,

and which will continue to be levied and collected, until September 30, 1947, is a legal and valid tax. The sole question on which you desire my opinion, as I understand it, is whether or not the fact that such a tax is now being levied and collected, and will continue to be levied and collected, until September 30, 1947, pursuant to an election previously held, operates to preclude the holding of a legal and a valid election on May 20, 1941, for the purpose of ascertaining whether or not such a tax should be levied and collected for a period of fifteen years from September 30, 1947, at which time the levy of the tax under the previous elections will expire.

The answer to your question is not without considerable difficulty, but, in my opinion, it should be answered in the negative. Stated differently, I think such an election for such purpose may be legally and validly held on May 20, 1941, notwithstanding the fact that such tax is now being levied and collected, and will continue to be levied and collected, for such purpose, until September 30, 1947, pursuant to an election previously held.

At the outset, it should be pointed out that the Appellate Courts of this State have not passed directly upon the legal question involved. However, this office, on three occasions, has given an answer to this legal question different from that given hereinabove. Opinion to Hon. Edward L. Colebeck, Superintendent of Education, Hale County, Greensboro, Alabama, under date of February 24, 1928 (Biennial Report of Attorney General, 1926-28, page 449); Opinion to the Superintendent of Education, Elmore County, Wetumpka, Alabama, under date of April 23, 1929 (Biennial Report of Attorney General, 1928-30, page 290); Opinion to Hon. Solomon Baxter, Superintendent of Education, Houston County, Dothan, Alabama, under date of May 21, 1935 (Opinions of the Attorney General, Office Edition, Vol. 4A, page 45).

The two opinions last cited do not represent independent rulings on the question, but merely cite the Colebeck opinion as authority for the conclusion reached. Consequently, they will not be separately considered, for, if the Colebeck opinion stands, they stand, and if the Colebeck opinion falls, they fall with it. I do deem it advisable to consider the Colebeck opinion and express my views thereon.

In that opinion the question under consideration was identical with the question here considered, except that the tax involved was the special district tax authorized by the Third Amendment, supra, rather than the special county tax authorized thereby. However, the legal propositions involved, insofar as the question here under consideration is concerned, are the same. In reaching the conclusion that a second election could not be held under similar conditions to those here presented, it was stated in that opinion:

> "The vote is on the length of time the exercise of the power is to continue. This clearly means, in my opinion, the length of time form the date of election. *** If the time for the beginning of the power (the power to levy the tax) can be fixed by vote, it certainly is not provided for in the Constitution and would, in my opinion, violate the letter and intent of the Constitution.
>
> "If such can be done, we immediately begin to speculate as to how far in the future can the beginning of the period of time be placed? Can

you keep on holding elections indefinitely and voting on a period at a time to see how much the people will stand for before a period already voted has expired?"

Insofar as the reason for the conclusion there reached is based upon the view that the time for the beginning of the exercise of the power to levy the tax cannot be fixed by vote, the Supreme Court of this State has spoken to the contrary. In the case of **Alexander v. Board of Revenue,** 219 Ala. 110, 121 So. 390, the Court considered the validity of an election held in Lawrence County on September 18, 1928, on the question of whether or not such a tax should be levied for a period of twenty years from September 30, 1927, and the validity of an order of the county governing body made on September 21, 1928, levying the tax from September 30, 1927. The Supreme Court held both the election, and the tax levied pursuant thereto, to be legal and valid. To like effect is the case of **Harris v. Cope,** 236 Ala. 415, 183 So. 407.

Adverting now to the questions propounded in the Colebeck opinion, supra, it is interesting to note that no answer to these questions was given. No doubt the author of that opinion felt that the questions answered themselves. From the tenor of his questions, I gather that he felt that such a procedure would be against public policy. Conceding, without deciding, that his view was correct, considering the constitutional amendment alone, in the absence of enabling legislation on the subject, I do not believe that it can be said that it is correct today. This for the reason that the Legislature has, in my opinion, declared the public policy of the State in regard to this matter by Section 20 of Act No. 186, S. 129, approved March 15, 1939 (General Acts, 1939, page 334), which reads as follows:

"Section 20. ELECTIONS. **Elections for the purpose of voting special taxes for any school purpose or for school purposes generally under the Constitution may be held at any time in accordance with law for one or more of the following purposes:** (1) voting such tax where no such tax is being levied, (2) **voting such tax for a period additional to the period for which the tax then being levied has been voted,** (3) voting an additional rate of such tax where such tax has been voted at a rate less than the limit permitted by the Constitution, (4) voting such tax for a different purpose from that for which the tax has already been voted and beginning with the fiscal year after such election, the purpose of the new election shall govern, provided the change of purpose for which a tax is voted shall not deprive the holders of outstanding warrants of their rights, or (5) voting such tax for the purpose of consolidation or enlargement of special tax districts, provided that the holders of outstanding warrants shall not be deprived of their rights. **No election for the voting of the tax shall be held which would authorize the tax for a period of aggregate periods which would cause the tax to become due and payable later than thirty years from the October first next after such election.** All warrants heretofore or hereafter issued as preferred claims against a special tax under the Constitution shall continue such claims against such tax until paid, whether such tax was voted at one time or from time to time and whether such tax was voted at the time the warrants were issued or thereafter." (Emphasis supplied)

As I read the above quoted section, and especially the emphasized portions thereof, the Legislature has declared it to be the public policy of the State of

Alabama in regard to the legal proposition instantly before us that an election may be held at any time for the purpose of voting such a tax for such purposes for a period of time additional to the period for which the tax then being levied has been voted, so long as such an election would not authorize such tax for a period or aggregate periods which would cause the tax to become due and payable later than thirty years from October 1 after such election.

Consequently, whether it be because the same was laid in error at the time it was written, or because subsequent legislation impels a different conclusion, the Colebeck opinion, in my judgment, is no longer applicable, and it, together with the other opinions above cited, which follow the same, are hereby expressly overruled insofar as their present-day applicability is concerned.

In view of the above, it is my opinion that the fact that a special county tax of three mills is being levied and collected, and will continue to be levied and collected, in your County, for public school purposes, until September 30, 1947, pursuant to an election previously held in your County, at which a majority of the qualified electors of your County voting at such election voted in favor of the same being levied and collected for such period, does not operate to preclude the holding of a legal and valid election on May 20, 1941, for the purpose of ascertaining whether or not such a tax shall be levied and collected for a period of fifteen years from September 30, 1947, at which time the levy of the tax under the previous election will expire.

It is further my opinion that Section 20, supra, is specific authority for the holding of such an election, since, if the majority of the qualified electors voting in such election votes in favor of the same being levied and collected for the additional period, it will not authorize the tax for aggregate periods which would cause the same to become due and payable later than thirty years from October 1 next after the election.

Other legislation similar to Section 20, supra, is found in Act No. 301, S. 325, approved September 2, 1939 (General Acts, 1935, page 734), but that act has not here been considered for the reason that, in my judgment, Section 20, supra, being the last expression of legislative will on the subject, has superseded the provisions of Act No. 301, supra. This finds support in the action of the Code Committee in omitting Act No. 301, supra, from the Code of Alabama, 1940, which will become effective on May 31, 1941, while incorporating Section 20, supra, as a part of Section 235 of Title 52 thereof.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 14, 1941.

Hon. John D. Petree, Director,
Department of Industrial Relations,
Montgomery, Alabama.

Child Labor —

The giving of performances in public places by boys' choirs composed of boys under 16 years of age, who receive no compensation, does not violate Section 3500 (15) of the Code of Alabama, 1923.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of May 5, 1941, is as follows:

"We wish to secure your opinion of Section 3500, Paragraph 15 of the Alabama Child Labor Law as it relates to the performance given by a boys' choir composed of children under 16 years of age.

"We quote from the Child Labor Law:

Sec. 3500. 'PLACES WHERE CHILD UNDER SIXTEEN FORBIDDEN TO WORK.—No child under the age of sixteen years shall be employed, permitted, or suffered to work in any capacity:

"(1) In, about, or . . . . . .

"(2) . . . . . .

—

—

—

"(15) Nor shall any child under the age of sixteen years be employed upon the stage of any theatre or concert hall, or in connection with any theatrical performance or other exhibition or show, except that children fourteen years of age may be employed as ushers in theatres or concert halls in accordance with the provisions of sections 3495, 3502 and 3503 of this chapter.'

"There are several boys' choirs in this state composed of boys under 16 years of age (some of the boys are 9 and 10 years of age but the average is around 12) who give performances in public places at which time an admission is charged. Some of these performances are given during the day and others at night. The proceeds are used to promote the work of the choir, including traveling expenses, cost of music, expenses of the director and business manager and other incidentals. Quite often the performance is sponsored by another organization or theatre for commercial

gain and the proceeds are divided between the two on a percentage basis. It is our understanding that the children are not paid for their services but are given money from the proceeds for certain expenses. A number of these performances are given in various parts of the state as well as in other states which require considerable traveling. Each year the choir goes on a tour and the children are away from school for several weeks, during which time a private teacher is employed.

"In view of the information stated above, we shall appreciate your opinion as to the legality of these performances under Section 3500, Paragraph 15 of the Alabama Child Labor Law.

"Should your opinion be in the negative, would it be altered if the following conditions existed: (1) if the choir secured as sponsors for its performances a religious, charitable, educational, literary or other benevolent organization and did not receive any of the proceeds; (2) if the choir did not charge admission to its performance?

"We shall appreciate your opinion on this subject as soon as possible, inasmuch as action is being withheld until it is received."

It is my opinion that it would not be a violation of Section 3500(15) of the Alabama Child Labor Law for the boys' choir composed of boys under 16 years of age, to give performances at public places, under the facts detailed in your letter of inquiry.

Section 3500(15) of the Alabama Child Labor Law has been quoted in your letter and will not be again set forth.

This office has heretofore held that the term "employed" as used in Section 3500(15) implies that there will be a contract of employment for compensation, and work for hire, pursuant to such contract, whether such contract be oral, written or implied. Quarterly Report, Volume XIV, page 105. Cf. Biennial Report of Attorney General, 1930-32, pages 8, 9.

It was further held in the opinion in Quarterly Report Vol. XIV, page 105 that the purpose of the legislative provision considered was to prevent a child under 16 years of age from being employed in the prohibited establishments, exhibits or shows, when by the nature of the work or the place of employment, the health or moral welfare of the child might be impaired.

Applying the same conclusions to the facts which you present, it is my opinion that since the children are not "employed" in the sense in which the term is used in Section 3500(15), there can be no legal objection to their appearing in the manner stated.

Nor, in my opinion, would the situation be altered if the choir secured as sponsors for its performances religious, charitable, educational, literary or other benevolent organizations, and did not receive any part of the proceeds; nor would it be different if the choir did not charge admission to its per-

formances. Indeed under the latter situations the conclusion that Section 3500(15) would not be violated finds even stronger support.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 16, 1941.

Hon. W. T. Siebels,
Circuit Solicitor,
Montgomery County,
Montgomery, Alabama.

Pardons, Paroles and Probation —

1. The provision in the Probation Act (Section 1 of General Acts, 1939, page 434) that probation should not be granted to any defendant who "previously had been convicted and sentenced in any jurisdiction for the commission of a crime involving moral turpitude" applies to the time of the commission of the offense, and not to the time when application for probation is made.

2. Where plural offenses involving moral turpitude, of similar nature but separate and distinct, are committed on the same day, and the defendant is later convicted of each and sentences are imposed thereon at the same term, the court may grant probation in the first case in which sentence was imposed, even though other convictions and impositions of sentences intervened before application for probation, provided no conviction and sentence for the commission of a crime involving moral turpitude had occurred prior to the **commission** of such offense.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion bearing date of May 12, 1941, is as follows:

"I respectfully request that you furnish me with an opinion concerning the proper construction to be given our probation statute as applied to a state of facts such as is set forth in this letter.

"Acts 1939, page 434, section 1, reads in part as follows: 'The court shall have no power to suspend the execution of sentence . . . in cases in which the defendant previously has been convicted and sentenced in any jurisdiction for the commission of a crime involving moral turpitude.'

"Does this provision withdraw from the court the power in its discretion, to place on probation a person, not otherwise previously convicted and sentenced, under the following facts: Plural offenses involving moral turpitude, of similar nature but separate and distinct, are committed on the same day; plural indictments charging these offenses are found by the same grand jury; pleas of guilty are entered to each of these indictments at the same term of court; and sentences are imposed thereunder at the same term, or perhaps even on the same day?

"It is assumed in this letter that the case is such that the court would otherwise have the power to grant probation, and it is also assumed that the court would have power to grant probation in the first case in which sentence was imposed. The question is as to whether conviction and sentence in the first case would deprive the court of the probation power in another case or cases of like nature called for sentence immediately or or very soon thereafter.'

The Supreme Court of California, in **People v. Superior Court In and For Imperial County,** 208 Cal. 688, 284 P. 449, has considered a question identical in legal effect with that presented by your letter of inquiry. The statute of California considered by the Court provided that "probation shall not be granted *** to any defendant unless the court shall be satisfied that he has never in any place been **previously** convicted of a felony. *** " The California Court, after a consideration of the purposes of the probation statute and the language thereof, concluded that a court had the power to entertain an application for probation on a manslaughter charge by a defendant who, after the commission of such manslaughter, was convicted of another offense committed prior thereto. The Court, in reaching this conclusion, determined that the word "previously," as used in the above quoted excerpt from the probation statute, applied to the time of the commission of the offense, and not to the time when the application for probation was being passed upon.

The language of the Court is so apposite, and the statutes of California in this regard are so like those of this State, that the pertinent portion of the opinion is hereinbelow quoted for your further information:

"We find in the theory of the probation law itself, as expressed in the statute, a legislative intent in harmony with the respondents' contention. Under Section 1203 the court must, if permission to apply for probation be not denied, refer the matter to the probation officer for investigation and report 'upon the circumstances surrounding the crime and concerning the defendant and his prior record, which may be taken into consideration either in aggravation or mitigation of punishment.' It is made the duty of the probation officer to 'make an investigation of circumstances surrounding the crime and the prior record and history of the defendant,' and report the same to the court. The 'prior record' obviously means the record of the defendant before the commission of the offense of which he has been convicted and as to which he is making an application for probation. If it appear that he has suffered a prior conviction of a felony, that fact is in aggravation of punishment by removing him from the application of the probation law. If no such prior record appear, discretion is then vested in the court to determine whether there were miti-

gating circumstances requiring, or that the ends of justice would be subserved by granting, probation. The frequent reference in the section to the 'circumstances surrounding the crime' and to the time of 'the perpetration of the crime,' together with the general theory and purposes of the probation law, indicate persuasively an intention to use the word 'previously' as applying to the time of the commission of the offense and not to the time when the application for probation is being passed on."

The foregoing logic and conclusions of the Supreme Court of California, when applied to your scientific question, enables the opinion to be expressed that a conviction and sentence in the first case called, under the facts detailed by you, would not deprive the Court of the power of probation in another case of like nature called for sentence immediately or very soon thereafter, where the Court can determine, as a matter of fact, that prior to the commission of the offenses for which sentence is imposed the defendant had not been convicted and sentenced for the commission of a crime involving moral turpitude.

A word of caution is inserted by the Supreme Court of California in the case above cited and quoted from, and the remarks of the Court in this regard are also here particularly pertinent and are herein adopted. These remarks follow:

"We are, of course, not to be taken as holding or intimating that the court may not, in the exercise of its discretion in passing upon an application for probation, take into consideration any fact or circumstance concerning the defendant, developed at any time prior to the court's final action on the application. Circumstances might arise after the commission of the offense or even after conviction which would render a probationary order inadvisable. We are here dealing with a question of power to entertain the application, and not with the discretionary exercise of that power."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 16, 1941.

Hon. C. A. Waite,
Sheriff, Clarke County,
Grove Hill, Alabama.

Costs and Fees — Sheriffs —

Sheriffs' fees for attending various courts discussed.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of December 17, 1940, in which you request my official opinion as follows:

"It is my opinion that Section 7287 of the 1923 Code of Alabama, the pertinent part of which reads as follows:

"'7287. **Fees Allowed to Sheriffs** — Sheriffs are entitled to receive the following fees for the following services *** Attendance upon the probate court when a jury is in attendance, or upon the circuit court when a jury is in attendance, each day to be paid out of the county treasury Three Dollars' —

"provides authority for the payment of Three Dollars per day to a Sheriff for his attendance upon any and all terms of the circuit court when a jury is in attendance, except as limited by the provisions of Section 3741 of the Code, the pertinent part of which reads as follows:

"'3741. **Sheriff's fees and allowances, Sheriff to file application for fees when:** — Sheriffs are entitled to the following fees and allowances in criminal cases *** for summoning jury in capital cases, or to any special court for the trial of criminal, to be paid out of the county treasury, Five Dollars for attendance each day on such court to be paid by the County Two Dollars.'

"You will notice that Section 7287 does not say that the sheriff shall receive such fees in 'civil cases only' but that Section 3741 does have a limited field of operation in that it provides for a fee of $2.00 for attending special sessions of the circuit court when a jury is in attendance for the trial of criminal cases. It is my belief that except for special sessions of the circuit court which are called for the trial of criminal cases, a sheriff is entitled to a fee of Three Dollars for each day of attendance when a jury is in attendance regardless of whether the attendance be for a session which is trying civil or criminal cases.

"I will appreciate it if you will give me an official opinion as to whether the fee allowed by Section 8287 (sic) of the Code for attendance upon sessions of the circuit court when a jury is in attendance is limited to civil cases only, or whether it applies to all sessions of the circuit

court when a jury is in attendance, except those sessions which are called for the trial of criminal cases."

In view of the conflicting opinions of this office relative to the proper fees allowed sheriffs for attending the various courts of the State, I will take this opportunity of discussing generally the subject rather than confine this opinion to the specific inquiry in your request.

Section 10189, subsection 2, Code of 1923 (Code of 1940, Title 54, Section 5, subsection 2), provides as follows:

"10189. **Duties of sheriff.** — It is the duty of the sheriff —

"(2) To attend upon the circuit courts held in his county, when in session, and the courts of probate, and the county courts, and the court of county commissioners, when required by the judge of probate, and to obey the lawful orders and directions of such courts."

The above places the duty upon sheriffs to attend the various courts of the State enumerated therein. However, it must be borne in mind that a public officer takes his office cum onere, and is entitled to no salary or fees except those which the statute provides. Statutes relating to the fees and compensation of public officers must be strictly construed, and such officer is entitled only to what is clearly given by law.

McElderry v. Abercrombie, 213 Ala. 289, 104 So. 671;

Long v. O'Rear, 186 Ala. 558, 65 So. 59;

Mobile County v. Williams, 190 Ala. 639, 61 So. 693.

The only statutory authority that I am able to find allowing sheriffs a specific fee for attending courts will be discussed below.

Section 3741, Code of 1923 (Code of 1940, Title 11, Section 100), provides in pertinent part as follows:

"3741. **Sheriff's fees and allowance; — sheriff to file application for fees, when.** — Sheriffs are entitled to the following fees and allowances in criminal cases — that is to say:

"For summoning jury in capital case, or at any special court for the trial of criminal to be paid out of the county treasury $5.00

"For attendance each day on such court to be paid by the county ..... $2.00."

The fee of $2.00 per day allowed under the above is confined to attendance at any special term (session) of circuit court for the trial of criminal cases. It has no application to regular terms (sessions) of the circuit court.

Torbert v. Hale County, 131 Ala. 143, 30 So. 453; Quarterly Report of Attorney General, Volume XVII, page 20.

Section 7287 of the 1923 Code, as amended (Code of 1940, Title 11, Section 34), provides in pertinent part as follows:

"7287. **Fees allowed sheriffs.** — Sheriffs are entitled to receive the following fees for the following services:

* * * *

"Attendance opon the probate court when a jury is in attendance, or upon the circuit court when a jury is in attendance, each day, to be paid out of the county treasury ..... $3.00"

It will be noted that a fee of $3.00 per day is allowed sheriffs for attendance upon the probate court when a jury is in attendance, or upon a circuit court when a jury is in attendance. In my opinion the above is applicable only to terms (sessions) of Circuit Court for the trial of civil cases and has no reference to terms (sessions) for the trial of criminal cases. The same appears in the Civil Code. The fee of sheriffs for attending terms (sessions) for the trial of criminal cases in the Circuit Court is specifically set out in Section 3741, supra.

The above conclusion is strengthened by the fact that in the Code of 1940 there is a title dealing with "Costs and Fees," which is Title 11. Chapter 1 of said Title is headed "In Civil Cases." This chapter contains Section 7287 of the Code of 1923, as amended, the same being Section 34. Chapter 2 of said Title is headed "in Criminal Cases" and Section 3741 is included in said Chapter as Section 100.

There is no specific fee allowed for sheriffs attending regular sessions of the Circuit Court for the trial of criminal cases.

I might also state that there is no specific fee provided for attendance on non-jury terms of the Circuit Court, either criminal or civil, or of the Probate Court. Cf. Biennial Report of Attorney General, 1934-1936, pages 280, 653, and 655.

The sheriff's fee for attendance on county courts is provided for in Section 3808, Code of Alabama, 1923 (Code of 1940, Title 13, Section 320), which provides as follows:

"3808. **Terms attended by sheriff, etc; his fees.** — The terms of the county court shall be attended by the sheriff or deputy sheriff; and, in their absence, some suitable person shall be appointed by the court to act in their stead, whose compensation shall be two dollars a day, to be paid out of the county treasury."

There is no specific statutory provision allowing a fee to sheriffs for attending sessions of the Court of County Commissioners.

As above stated, there is no specific fee allowed sheriffs for attendance on the courts of this State in the following cases:

1. Regular terms (sessions) of the Circuit Court for the trial of criminal cases.

2. Non-jury terms (sessions) of the Circuit Court, either criminal or civil.

3. The Probate Court where no jury is in attendance.

4. Commissioners' Court.

In each of these above instances, the sheriffs' compensation for services in connection therewith would be part of ex officio fees allowed sheriffs under the provisions of Section 7287 of the Code of 1923, as amended, supra.

It might be well to point out that the fees allowed sheriffs for attendance on the courts above discussed is payable out of the general fund of the county and do not constitute a part of the costs of the case. Cf. Quarterly Report, Attorney General, Volume XIII, page 119.

All former opinions of this office which are in any way in conflict with the foregoing are hereby overruled, or are modified to conform to this opinion.

The corresponding sections of the Code to those under discussion are cited due to the fact that the Code of 1940 will become effective under date of May 31, 1941.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 16, 1941.

Hon. Frank M. Embry,
Solicitor, 16th Judicial Circuit,
Pell City, Alabama.

Pool Rooms —

Pool rooms may not be operated beyond corporate limits of incorporated cities and towns, even though within police jurisdiction of said city or town.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 3, 1941, in which you request my official opinion as follows:

"Will you please give me an opinion as to whether Pool rooms can be operated within the police jurisdiction of town of less than 6,000 inhabitants since Section 4275 of the Code provides that it is a violation of law to operate a pool table outside the incorporated city or town but no reference as to whether the police jurisdiction is considered under this Section.

"If you can get this to me by the 8th of the month, I will be very grateful to you."

Section 4275, Code of Alabama, 1923, is as follows:

"4275. Keeping or operating pool or billiard tables outside incorporated cities or towns. — Any person who keeps, operates, or exhibits a pool or billiard table on which the public can play, whether for pay or not, outside of any incorporated city or town, having a police force, must, on conviction, be fined not less than fifty nor more than one hundred dollars for each table, and may also be sentenced to hard labor for the county for not less than thirty days nor more than fifty days. But this section shall not apply to clubs conducted by companies which provide welfare work for their employes; nor shall it apply to pool or billiard tables kept or operated at any military camp of the United States or within one-fourth of a mile of such military camp nor to pool or billiard tables kept and operated at any nitrate plant or on any land acquired and held by the United States."

It is my opinion that Section 4275, supra, makes it unlawful for any person to keep, operate or exhibit a pool or billiard table on which the public can play outside of the corporate limits of a city or town, even though said pool or billiard table is located within the police jurisdiction of such city or town. I call your attention to the fact that the above mentioned section does not apply to clubs conducted by companies which provide welfare work for their employees or to pool or billiard tables kept or operated at any military camp of the United States or within one-fourth mile of such military camp, nor to such tables kept or operated at any nitrate plant or on any land acquired and held by the United States.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 21, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
THE CAPITOL.

Uniform System of Accounting and Reporting —

The Chief Examiner of the Division of Public Accounts does not have authority, under the Uniform System of Accounting and Reporting Act, to authorize or require the discontinuance of the keeping of any records required to be kept by the county officials of Jefferson County, at Bessemer, Alabama, under the provisions of Act No. 490, H. 1566, approved September 16, 1915 (General Acts, 1915, page 549).

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your request for official opinion bearing date of April 23, 1941, is as follows:

"We are now engaged in the installation of our Uniform Accounting System for the County Commission and Treasurer of Jefferson County, and we are getting full cooperation from the Jefferson County officials. However, our Uniform Accounting System contemplates a central controlling set of books and records and purchasing procedure and in Jefferson County they have been maintaining a special and complete set of records for the County Commission in the Bessemer Cut-Off and this has also been the practice by the Deputy Treasurer in the Bessemer Cut-Off.

"The question now arises as to whether or not, under our Uniform Accounting System, the State has the authority to require the Jefferson County Commission and the Treasurer to maintain complete controlling records in their respective Birmingham offices of all transactions, including the issuance of requisitions and purchase orders, or whether under Act 490, page 549, General Acts of 1915 the County Commission and the Treasurer have the authority and/or the duty of maintaining complete controlling sets of records in their Bessemer Cut-Off branch offices?

"The Uniform System of Public Accounting Act, page 43, General Acts of 1935, provides therein that all laws in conflict with the provisions of the Act are repealed. In connection with the Act I wish also to refer you to the Department of Finance Act of 1939 and particularly to your opinion addressed to Hon. Travis H. Johnson, page 173, Volume 18, Quarterly Report for January-March 1940.

"For your information, it is my opinion that we have the authority and the duty to require complete and all controlling sets in the Birmingham offices of the County Commission and the County Treasurer but

that, on the other hand, the County Commission and the Treasurer have the authority to keep or have kept any subsidiary or extraneous records they may desire in their Bessemer branch offices.

"Inasmuch as we are right now engaged in the installation of these particular Uniform Accounting records I should very much appreciate your giving this request preferred attention and furnishing me with your advice as early as you possibly can."

The Uniform System of Accounting and Reporting Act is Act No. 26, H. 49, approved February 8, 1935 (General Acts, 1935, page 43). The duties required by Section 1 of said Act are today vested in, and authorized by, the Chief Examiner of the Division of Public Accounts. See Act No. 112, H. 72, approved March 17, 1939 (General Acts, 1939, page 144).

The Supreme Court of Alabama, in the case of **Board of Revenue and Road Commissioners of Mobile County v. The State of Alabama, ex Rel. George E. Stone, as Treasurer of Mobile County, Alabama,** decided April 24, 1941, (M.S.) has spoken to the effect of the Uniform System of Accounting and Report Act as follows:

"The Act of 1935 (General Acts 1935 p. 43) makes provisions for 'establishing and maintaining a uniform system of accounting and reporting in the county offices in all counties of this State whose officers are charged with the duty of receiving, disbursing and accounting for any public funds or other funds.'

* * * * * *

"But, as above indicated in the title of the 1935 Act, these Acts look to a uniform system of accounting and reporting, the evident purpose being to facilitate the examination of the books and records of all such officials. The 1935 Act in Sections 2 and 3 makes express reference to accounting and reporting to the end that a 'Uniform System of Accounting and reporting in County offices shall be established.' ***

"There is nothing in the Act indicating a legislative intent to disturb any substantive provisions of the law or to work any change in the duties imposed by law upon such county officials. And it is clear enough the meaning of the words 'accounting' and 'reporting' as used in the Act and as defined in Webster's International Dictionary would not justify such interpretation.

* * * * * *

"As is well understood repeal by implication is never favored. **Levy et al. v. Jones,** 208 Ala. 104, 93 So. 733.

"There is ample field of operation for the 1935 *** Acts without repealing any existing laws and we think it clear the law making body did not intend a change in the existing system of substantive law as herein

indicated. So much was indicated in the recent case of **Holcombe v. Chandler.** (Present term, M. S.)."

Section 3 of Act No. 490, H. 1566, approved September 16, 1915 (General Acts, 1915, page 549), dealing with the county offices of Jefferson County, located at Bessemer, Alabama, provides:

"Sec. 3. That there shall be kept at such offices all records papers and books in all respects similar to the records, papers and books that are required to be kept or may be kept by such officers at their respective offices at the county site."

In view of the language of the Supreme Court quoted supra, it is my opinion that you, as Chief Examiner of the Division of Public Accounts, do not have authority, under the Uniform System of Accounting and Reporting Act, to authorize or require the discontinuance of the keeping of any records required to be kept by the county officials of Jefferson County, at Bessemer, Alabama, under the provisions of Act No. 490, supra.

The language of the opinion appearing in Quarterly Report of the Attorney General, Vol. XVIII, page 173, referred to in your letter of inquiry, must now be read in the light of the opinion of the Supreme Court, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 22, 1941.

Hon. Roy L. Smith,
County Attorney,
Russell County,
Phenix City, Alabama.

Motor Vehicles — Licenses — Schedule 158.19 of Section 348 of the 1935 Revenue Act, as amended, construed —

Thirty percent of the revenue derived from sale of motor vehicle licenses to foreign bus company and to taxi cab operators who reside in Georgia held payable to Phenix City, Alabama, when operation of said bus company and taxicabs is confined to the streets of said city.

Opinion by Assistant Attorney General Small.

Dear Sir:

Your request for an official opinion under date of December 26, 1940, is as follows:

"The County Commission of Russell County has had a demand made upon it by the City of Phenix City for the reimbursement of revenue from the sale of automobile tags to the Columbus Transportation Company and taxi cabs which operate from the City of Columbus, Georgia. These taxi cabs and buses do not operate out of the corporate limits of Phenix City. The City contends that since only the streets of the City are used that the Probate Judge should remit to it and not to Russell County for a portion of the revenue derived therefrom."

In reply, I wish to call your attention to Schedule 158.19 of Section 348 of the 1935 Revenue Act as amended, by Act No. 397, H. 780, approved September 13, 1939 (General Acts, 1939, page 518), which provide as follows:

"Schedule 158.19. The money collected as motor vehicle and trailer license taxes, less all the expense necessary for the purchase and delivery of the motor vehicle tags required by this Act, the purchase and delivery of the blank receipts, license blanks and other printing necessary in the licensing and taxing of motor vehicles, and the salary of officers or employees engaged in such department, together with all other necessary expenses for the enforcement of this Act, shall be distributed as follows: Seventy per cent (70%) to the State and thirty per cent (30%) to the incorporated city or town in which the owner of the motor vehicle resides. All amounts of motor vehicle and trailer license taxes received by a city or town hereunder in excess of twenty per cent (20%) of such motor vehicle and trailer license taxes shall be used exclusively for the construction, improvement and maintenance of highways or streets and administrative expenses in connection therewith, including the retirement of bonds for the payment of which such revenues may have been pledged, and for no other purposes. If the owner of a motor vehicle does not reside in an incorporated city or town, then eighty per cent (80%) shall go to the State and twenty per cent (20%) to the county in which the owner of the motor vehicle resides. The money collected as motor vehicle license taxes by the State, less salaries and expenses, shall be used exclusively to create a sinking fund for the prompt and faithful payment of the principal and interest on good road bonds and for construction, maintenance and as required under provisions of Article XX of the Constitution of Alabama."

I am advised by the departmental officer charged with the enforcement of this law, that the administrative construction heretofore applied to this statute has been that the license taxes here considered should be distributed to the political subdivision where the property is properly subject to taxation. This construction is in accord with the principle of taxation as expressed in the case of **National Dredging Co. v. State**, 99 Ala. 462, 12 So. 720, in which case it was held that tangible property owned by a person whose domicile is in another state may, by some degree of permanency of its location, and by its becoming so incorporated with, and a part of, the tangible property of this state, acquire a situs for taxation purposes in this state. **Tennessee Coal & Iron Co. v. State**, 239 Ala. 19, 193 So. 143. Thus the busses and cabs were properly taxed in Phenix City. This administrative construction is here followed. See **Jones v. Johnson** (Sup. Ct.), 199 So. 539, and cases therein cited.

It is my opinion that the revenue derived from the sale of motor vehicle licenses to the Columbus Transportation Company and for taxi cabs which operate in Phenix City from the City of Columbus, Georgia, should be distributed under Schedule 158.19, as amended, supra, as follows: seventy percent to the State of Alabama, and thirty percent to Phenix City.

Schedule 158.19, as amended, supra, appears in the Code of 1940 as Title 51, Section 713, which Code will become effective May 31, 1941.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 22, 1941.

Hon. Isaac Johnson, Jr.,
Judge of Probate,
Lawrence County,
Moulton, Alabama.

County Financial Control Act —

General Acts, 1935, page 803, as codified, Code, 1940, Title 12, Sections 73-91, includes all public funds under the supervision and control of the county governing bodies, except funds exempted by Sections 86 and 87.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of May 14, 1941, in which you request my official opinion as follows:

"Would appreciate your opinion as to Title 12, Section 74 of the Code of 1940, relative to budgeting County Public Funds. The Code prior to this required the budgeting of the fund known as General Fund only. The present Code substitutes all public funds for the former Code the General Fund.

"In the present Code, though it was enacted in 1940 and appears to apply to all funds, there is an editor's note an opinion taken from Attorney General Report, 1936-38, page 25, stating that it does not apply to the Gasoline Fund. Under these conditions, I am unable to know whether this editor's note has to do with the present Code or the former Code.

"Does the present Code require budgeting of the Gasoline Fund, or the General Fund and other funds excepting the Gasoline Fund?"

The County Financial Control Act (Act No. 379, H. 191, approved September 9, 1935, General Acts, 1935, page 803) has been codified in the Code of 1940 as Title 12, Sections 73-91, inclusive.

The opinion referred to in your inquiry, at the time it was written, was correct, based upon the language of the 1935 Act referred to above. The specific language of that Act limited its operation to the General Fund. However, the Act, as codified, has had its field of operation extended to cover "all public funds under their (county governing bodies) supervision and control." Title 12, Section 74.

By the express language of Sections 86 and 87, Title 12, the provisions of the Chapter (Act No. 379, as codified) do not apply to county bonds outstanding or that may be hereafter issued under authority of law, or to public school funds administered by county boards of education, by whatever name they may bear.

It is my opinion that under the Code of 1940, the county governing bodies will be required to budget all public funds coming under their supervision and control, with the exception of those funds exempted therefrom by Sections 86 and 87, supra. You are, therefore, advised that the gasoline funds, being public funds, under the supervision and control of the county governing body, fall within the purview of this Act, as codified.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 23, 1941.

Hon. J. S. Wittmeier,
Judge of Probate,
Blount County,
Oneonta, Alabama.

Licenses —

A person who has secured a wholesale lumber dealers' license under the provisions of Schedule 84 of Section 348 of the 1935 Revenue Act is not entitled to engage in the business of a wholesale lumber dealer in each county of the State, but must obtain a license under said schedule for each place of business.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion of April 25, 1941, follows:

"Stevenson Lumber Company has a main office in Birmingham, Jefferson County at which place they sell lumber. They have taken out a wholesale lumber dealers license under section 546 of Revenue Code of 1940 under which the State received $100.00 and Jefferson County $50.00. Said Company has a branch in Blount County at which they buy logs and lumber and manufacture it into a finished product and sell it, both wholesale and retail at said branch office in Blount County. They contend they are due no license in Blount County under said section 546 of Revenue Code of 1940 because they have secured a license in Jefferson County. Does the said Stevenson Lumber Company owe for said license in Blount County? If not is not Blount County entitled to $50.00 license for the doing of said business in Blount County, said $50.00 being the County's part of a wholesale lumber dealers license.

"May I call your attention to the recent case of State vs. Downs on this point cited in 197 Southern Reporter at page 382."

Before proceeding to an answer to your question, I deem it advisable to here set out your supplemental letter of May 12, 1941, which is as follows:

"With reference to your letter of May 8th I wish to state the Stevenson Lumber Company in Blount County buys timber and undressed lumber at their place of business in Blount County or anywhere in the County. They have a saw mill and planing mill in Blount County with complete outfit to make timber into a finished product. They sell lumber, both finished and unfinished, in any manner, both retail and wholesale, to anyone at their place of business in Blount County. They have a saw mill license in Blount County and a wholesale lumber dealers license in Jefferson County."

It appears from the above request that the question you desire answered is whether or not the Stevenson Lumber Company, by virtue of the fact that it has obtained a wholesale lumber dealer's license in Jefferson County, under the provisions of Schedule 84 of Section 348 of the 1935 Revenue Act (Code, 1940, Title 51, §546), is entitled to conduct a wholesale lumber business in Blount County without procuring a wholesale lumber dealer's license in Blount County.

In view of the provisions of subsection (a) of Section 350 of the Revenue Act of 1935 (Code, 1940, Title 51, §831, subsection (a), this concern is not entitled to conduct a wholesale lumber dealer's business in Blount County, by virtue of the fact that they have procured a license to conduct a wholesale lumber dealer's business in Jefferson County. This subsection reads as follows:

"(a) Whenever a license is levied in this Act, there shall be collected both a State and County license for each place of business, except as specifically otherwise provided."

It will be noted from the above that where a license is required under the provisions of the 1935 Revenue Act, there shall be collected both a State and county license for each place of business except in cases where it is other-

wise specifically provided that no such license shall be collected. There is no provision in Schedule 84, supra, or elsewhere, that only one State and county license shall be collected for carrying on a wholesale lumber dealer's business.

It appears from the facts submitted by you that this concern has secured a sawmill license in Blount County, but has not secured a wholesale lumber dealer's license in said county. The fact that this concern has secured a sawmill license in Blount County would not entitle such concern to operate as a wholesale dealer in lumber, as this sawmill license only authorizes this concern to sell at retail from its sawmill. **State v. Downs** (Supreme Court), 197 So. 382.

In my opinion, from the facts submitted by you, this concern is in truth and in fact engaged in the wholesale lumber business in Blount County. In this connection, I quote from the case of State v. Downs, supra, wherein the Supreme Court, speaking to a similar question, observed:

> "As amended or clarified by the Act of 1935, we are convinced a wholesale dealer in lumber means one who sells at wholesale, no matter at what stage it has been purchased."

It appears from the above, and from a consideration of the Downs case as a whole, that the Supreme Court recognizes the fact, that regardless of what other license a person has taken out, if such person actually engaged in the wholesale lumber business, then such person must procure a license as provided by Schedule 84, supra.

You are, therefore, adivsed that in my opinion this concern is liable for the license provided by Schedule 84, supra, for the business which it conducts as a wholesale dealer in lumber in Blount County.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 23, 1941.

Hon. Coma Garrett, Jr.,
Judge of Probate,
Clarke County,
Grove Hill, Alabama.

Bonds — Right to Refund —

Where the right to redeem bonds before maturity was not reserved at the time of issuance, no right exists to call the same without permission from the holders thereof.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of March 7, 1941, in which you request my official opinion as follows:

> "Enclosed you will find Bond No. 29, State of Alabama, County of Clarke funding bond, dated April 1, 1930 for $1,000.00 with interest at 5¼ percent. On April 1st, 1930 Clarke County issued bonds in the amount of $200,000.00 similar to the one herein enclosed. This was done, of course, prior to the time I assumed the Probate Office in January, 1935. I am glad to state that we have paid $15,000.00 of these bonds, but the County of Clarke still owes $185,000.00, $5,000.00 of which is due April 1st. We have the money ready to pay the instalment due at that time. The main purpose of this letter is to find out from you if we have the legal right to recall the outstanding bonds, which would be $180,000.00 after April 1st, and then sell warrants or bonds for the payment of same. In other words, we would like to refund these bonds if possible because we could do so at a much lower rate of interest. Your prompt attention to this will be highly appreciated."

It is my opinion that the County is without authority to call the bonds concerning which you inquire, without the consent of the holders thereof.

I have carefully examined the minutes of the Commissioners Court of Clarke County pertaining to the issuance of the bonds in question, copies of which minutes you forwarded me under date of May 17, 1941, and I find that these bonds are serial bonds, and that they mature without option of prior payment on April 1 of each year from 1933 to 1960, inclusive.

Indicative of the character of the instruments here considered is the notice of the election held on the 15th day of April, 1930, in Clarke County, for the purpose of voting upon and deciding whether or not the bonds should be issued. This election notice is, as pertinent, as follows:

> "Notice is hereby given that on the 15th day of April, 1930 an election will be held in Clarke County, Alabama, for the purpose of voting upon and deciding the question whether or not $200,000 bonds of the county shall be issued for the purpose of funding valid outstanding warrants for the payment of which warrants the county is authorized by law to expend money. The said bonds shall bear interest at not exceeding 6 per cent per annum and shall be dated 1st April, 1930 and mature on 1st April $5,000 in each of the years 1933 to 1948 inclusive and $10,000 in each of the years 1949 to 1960, inclusive."

The rule is stated in 20 C. J. S. 1208, Section 276, Note 70, that where it is optional with a county governing body to make county bonds redeemable on or before their maturity, the right to redeem before maturity must be reserved at the time of issuance, or it cannot be exercised.

Since it does not appear that there was reserved at the time of the issuance of these bonds a right to call them at a time other than the date set for

their retirement, it follows that no authority exists at this time to call the bonds and to refund them, unless, of course, consent of the holders is obtained.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 23, 1941.

Hon. Eugene B. Henry,
Commissioner of Licenses,
Jefferson County,
Birmingham, Alabama.

Taxation — Commissioner of Licenses — Commissions — Assessment and Collection of Ad Valorem Taxes on Motor Vehicles in Jefferson County —

1. Commissions of Commissioner of Licenses of Jefferson County, for assessing and collecting ad valorem taxes on motor vehicles, should be figured according to the graduated percentage schedule set out in Sections 22, as amended, and 161, as amended, of the 1935 Revenue Act, and without regard to the amount of collections of ad valorem taxes on other property, assessed and collected by the Tax Assessor and Tax Collector, respectively, of Jefferson County, or the amount of commissions paid on such collections.

2. Such commissions are payable to the County Treasury of Jefferson County.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of March 17, 1941, in which you request my official opinion as follows:

"Please refer to Act of 1931 Legislature, page 522, Section 19, and the Acts of 1939 Legislature, pages 466 and 467, relative to Tax Collectors and Tax Assessors commissions, and advise me whether the commissions I deduct from ad valorem taxes on automobiles for the account of the General Fund of the State and County should be straight one per cent for assessing and one per cent for collecting or whether they should be graduated, beginning at ten per cent and down to one per cent as provided in said Acts.

"The question involved is actually whether or not my assessments and collections on such motor vehicle ad valorem taxes should be treated as additional assessment and collections by the Jefferson County Tax

Assessor and Tax Collector or whether they should be treated separate and apart from the assessments and collections of those offices."

The office of Commissioner of Licenses of Jefferson County was created by Act No. 431, H. 880, approved July 16, 1931, General Acts, 1931, page 522, which act was held to be constitutional and valid in the case of **State ex rel. Ward v. Henry,** 224 Ala. 224, 139 So. 278. (Sections 11 and 15 of said act were amended by Act No. 196, H. 592, approved November 3, 1932, General Acts, 1932, page 206, but in respects not here material.) By said act, the Commissioner of Licenses was made a county officer, and had placed upon him the duties theretofore required of the judges of probate of the various counties of the State, with reference to the issuance of, and collection of, state, county and other licenses, and the duties theretofore required of the tax assessors and tax collectors of the various counties of the State, with reference to the assessment and collection, respectively, of ad valorem taxes on motor vehicles, and these officers were relieved of such duties. The Supreme Court, in the case of **State ex rel. Ward v. Henry,** supra, held this to be within the competency of the Legislature.

Sections 18 and 19 of said Act read, respectively:

"§18. That all duties required by law or which may hereafter be required by law of Tax Assessors and Tax Collectors with reference to the assessment and collection of ad valorem taxes on automobiles are hereby transferred from the Tax Assessor and Tax Collector of such counties and all powers and duties relative thereto shall be performed and exercised by the Commissioner of Licenses in such Counties and such Commissioners are hereby charged with each, any, all and every duty now required by law or which may hereafter be required by law of Tax Assessors and Tax Collectors with reference to the assessment and collection of the ad valorem tax on automobiles, trucks or other motor vehicles, and the Tax Assessor and Tax Collector of such counties are hereby relieved of all duties and responsibilities in reference thereto.

"§19. That the Commissioner of Licenses shall receive for the assessing of State and County ad valorem taxes on motor vehicles the same fees charges and commission now fixed by law or which may hereafter be fixed by law to be paid to Tax Assessor and Tax Collectors for the same services."

It is seen by Section 19, supra, that the compensation of the Commissioner of Licenses, for assessing and collecting ad valorem taxes on motor vehicles, is the same as that fixed by law to be paid to the tax assessors and tax collectors for the same services.

The tax assessors and tax collectors of the various counties of the State are compensated for the assessment and collection of ad valorem taxes on motor vehicles, respectively, on a graduated percentage schedule based on collections, as set out in Section 22 of the 1935 Revenue Act, as amended by Act No. 326, H. 322, approved August 31, 1939 (General Acts, 1939, page 467), and Section 161 of the 1935 Revenue Act, as amended by Act No. 325, H. 321, approved August 31, 1939 (General Acts, 1939, page 466), the collections of ad valorem taxes on motor vehicles being included in the total collections of ad

valorem taxes made by them. See opinion to Hon. I. C. Heck, State Comptroller, Capitol, under date of October 27, 1939 (Quarterly Report of Attorney General, Vol. XVII, page 153).

The method of computing the commissions to which the various tax assessors and tax collectors are entitled, under Section 22, as amended, supra, and Section 161, as amended, supra, respectively, is to apply the graduated percentage schedules contained in said sections, respectively, to the total amounts collected.

It is my opinion that this same method should be used in figuring the commissions of the Commissioner of Licenses, for assessing and collecting ad valorem taxes on motor vehicles in Jefferson County. In other words, to figure the amount of such commissions, for assessing such taxes, the total collections of such taxes made by him should be computed, and then the graduated percentage schedule contained in Section 22, as amended, supra, should be applied thereto. Likewise, in figuring the amount of such commissions, for collecting such taxes, the total amount collected by him as such taxes should be computed, and then the graduated percentage schedule contained in Section 161, as amended, supra, should be applied thereto.

In figuring these commissions, the amount of collections of other ad valorem taxes, assessed and collected by the Tax Assessor and Tax Collector of Jefferson County, respectively, and the amount of the commissions to the Tax Assessor and Tax Collector, respectively, for such assessments and collections, should not be taken into consideration. As pointed out above, the office of Commissioner of Licenses of Jefferson County is independent of, and separate from, the offices of Tax Assessor and Tax Collector of Jefferson County. To take these factors into consideration, in figuring the commissions of the Commissioner of Licenses of Jefferson County, for assessing and collecting ad valorem taxes on motor vehicles, in my opinion, would be unauthorized and would lead to almost hopeless confusion.

The conclusion here reached is in accordance with the construction uniformly placed on the pertinent statutory provisions by the administrative officers charged with the administration thereof, and is strengthened thereby. See **State v. H. M. Hobbie Grocery Company,** 225 Ala. 151, 142 So. 46; **Alabama Public Service Commission v. Jones,** 236 Ala. 370, 182 So. 452; and **Jones v. Johnson** (Supreme Court), 199 So. 539.

Of course, the commissions of the Commissioner of Licenses, for the assessment and collection of ad valorem taxes on motor vehicles, inure to the benefit of Jefferson County and should be covered into the County Treasury. See Section 11, as amended, supra, and Act No. 27, S. 123, approved March 8, 1933 (Local Acts, 1933, page 14).

What has been said hereinabove applies to commissions for assessing and collecting ad valorem taxes on motor vehicles for the account of the General Funds of the State and County, and question presented by your inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 24, 1941.

Hon. I. C. Heck,
State Comptroller,
Department of Finance,
Division of Control and Accounts,
CAPITOL.

Tax Assessors and Tax Collectors — Commissions —

Methods of computing commissions of tax assessors and tax collectors on collections from taxes in litigation discussed.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of March 10, 1941, is as follows:

"In what bracket in the State General Fund should we figure the rate of commission due Tax Assessors and Tax Collectors for taxes in litigation in the 1939 final settlement, and which taxes were collected and remitted to the State after final settlement?

"We will explain our method in making final settlement with Tax Collectors for current year taxes. We take the gross charges as shown by Tax Assessors' abstracts furnished this office and subtract the items the Assessors and Collectors are not due any commissions on, i. e., erroneous assessments, erroneous assessments homestead, insolvents, lands bid in by the State, and litigations. From the balance we deduct the amount allowed taxpayers as homestead exemptions; from the net balance we proceed to figure the Tax Assessors and Tax Collectors' commissions on a graduated scale. At the point we leave off figuring the commissions for Assessors and Collectors we start figuring the commissions due the General Fund on the amount of taxes which would be due on property except for the provisions of law exempting homesteads from State taxes.

"Now, the point we would like to get cleared up is this:

"We will take the taxes shown in litigation at the time of final settlement. When collection of these taxes is made at some time after the final settlement period, in which bracket are we supposed to figure the commission, the bracket before we subtract the homestead exemptions or after subtracting the homestead exemptions? For example:

"Tax Year 1939 at Final Settlement

"$7,644.80 Gross charges per Assessors' abstract

407.50 Errors, etc. (No commission allowed)

$7,237.30 Balance

2,792.90 Homestead exemptions allowed taxpayer

$4,444.40 Net to figure Assessors and Collectors' commission on.

"After figuring Assessors and Collectors' commissions on the $4,444.40 the graduated scale, as shown by Act No. 326 (General Acts 1939) and Act No. 325 (General Acts 1939), both approved August 31, 1939, we then proceed to figure the commission on the amount of $2,792.90 right where we had left off figuring the commission on the $4,444.40. The commission on the $2,792.90, which is the amount allowed the taxpayers for homestead exemptions, is paid into the General Fund as provided by the above named Acts.

"After final settlement, and in the following tax year, the Tax Collector collects and remits $374.50 of the amount in litigation at the time of final settlement. Should we figure the commission on this collection following the above amount of $4,444.40, which is after we deducted the amount allowed for homestead exemptions, or should we begin to figure the commission on this collection after the amount of $7,237.30, shown above, which is before we deducted the amount allowed for homestead exemptions, bearing in mind commissions were figured through the amount of $7,237.30 on the final settlement?

"All litigations are brought forward to the current tax year as a surcharge and are not included in the current year tax, therefore, in figuring commissions on litigation we go back to the prior year.

"We will appreciate as prompt a reply as possible to this request, as we are now preparing our work for Tax Collectors final settlements due to be made on or before July 10."

From your letter of inquiry, and other information which you have furnished me, I understand that it has been the practice of the State Comptroller both under Sections 22 and 161 of the 1935 Revenue Act, as originally enacted, and as amended respectively by Act No. 326, H. 322, approved August 31, 1939 (General Acts, 1939, page 467), and Act No. 325, H. 321, approved August 31, 1939, page 466), in computing the commissions of the tax assessors and tax collectors on collections from taxes in litigation, to place such collections in the last bracket of collections, and then apply the graduated percentage schedule provided in these sections.

In an opinion rendered to you on October 27, 1939 (Quarterly Report of Attorney General, Vol. XVII, page 153), I discussed generally the subject of the commissions of tax assessors and tax collectors, and the manner or method of computing the same, under Sections 22 and 161, both as originally enacted and as amended, supra. However, in your requests for opinion to which that opinion was in answer, and in the opinion itself, no consideration was given to commissions of the tax assessors and tax collectors on collections from taxes in litigation, or the manner or method of computing the same.

In that opinion the following statements were made:

"You have advised me that collections on which the commissions were based under the original sections, supra, were divided by you into three general brackets, (1) Amount collected from taxes on real and personal property assessed and collected through the regular channels, in which

case the assessments were made in one year and the collections on said assessments are made in the following year; (2) Amount collected from taxes on motor vehicles and from taxes on real and personal property that had escaped taxation (Assessments and collections of taxes on motor vehicles and real and personal property that had escaped taxation are made simultaneously, i. e., the assessments and collections are made in the same year); and (3) Amount which would have been collected from taxes due on real property except for the provisions of the presently applicable law exempting homesteads from State taxes.

"You further advised me that under the original sections, supra, you figured the commissions to which the Tax Assessors and Tax Collectors were entitled on collections by putting the amount collected from bracket one first, the amount collected from bracket two second, and the amount which would have been collected from bracket three last, and then applying the graduated percentage schedule provided in these sections."

In the course of the opinion, after pointing out that neither Sections 22 and 161, as originally enacted, or as amended, supra, contained any positive direction of the Comptroller as to the brackets in which he should place the amounts collected from various sources for the purpose of figuring the tax assessors and tax collectors commissions, and that these sections as originally enacted, and as amended, were in precisely the same terms (so far as this question is concerned), I approved the administrative construction which had been placed on these statutory provisions by the State Comptroller, as shown by the quoted excerpt from the opinion, supra, and held that construction to be controlling under said sections, as amended. In this connection, I made the following statement:

"Where the construction of a statute by the administrative department charged with the duty of enforcing or applying the statute has been uniform, and the statute is reenacted in precisely the same terms (so far as this question is concerned), the reenactment of the statute without change may be treated as a legislative approval of the departmental construction of the statute, quite as persuasive as the reenactment of a statute which has been judicially construed. See **State v. H. M. Hobbie Grocery Co.**, 235 Ala. 151, 142 So. 46, and authorities therein cited; **Alabama Public Service Commission v. Jones**, 236 Ala. 370, 182 So. 452."

Additional authority for this position is found in the case of **Jones v. Johnson** (Supreme Court), 199 So. 539.

On the basis of those authorities, and for the same reasons that caused me to approve the administrative construction placed upon the original sections, supra, which was considered in that opinion, and to hold that construction to be controlling under said sections, as amended, supra, I now approve the administrative construction which has been followed by the State Comptroller in computing the commissions to which tax assessors and tax collectors are entitled on collections from taxes in litigation, under both the original sections, supra, and said sections, as amended, supra, and hold said construction to be controlling under said sections, as amended, supra. In other words, it is my opinion that, in computing the commissions to which tax assessors and tax collectors are entitled on collections from taxes in litigation, you

should place such collections in the last bracket of collections — that is, the bracket below the one in which you place the amounts which would have been collected from taxes due on real property, except for the provisions of the presently applicable law exempting homesteads from State taxation, and then apply the graduated percentage schedule contained in said sections, as originally enacted, supra, or as amended, supra, as the case might be, depending upon the year in which the assessments were made, or the year in which the taxes were collected, as the case might be.

In the opinion to you, supra, I also pointed out that the commissions allowed to the tax assessor were his compensation for the performance of the services and duties required of him in connection with the assessment of property for taxation, and that his commissions accrued at the time he performs the services and duties, and not at the time they are paid to him, and cited several prior opinions of this office in support of that statement. For the same reason, and on the basis of the same authorities, I also held in that opinion that the commissions of the tax collector were his compensation for the performance of the services and duties required of him in connection with the collection of taxes, and that his commissions accrued at the time he performed those services and duties. Those statements are as applicable to commissions on collections from taxes in litigation as to commissions on collections from any other source.

Consequently, in applying the formula hereinabove set out for computing the commissions of the tax assessor on collections from taxes in litigation, you should go back to the year for which the assessments were made (without regard to the year in which the taxes were collected), and place such collections in the last bracket for that year — that is, the bracket below the one in which are placed the amounts which would have been collected from taxes due on real property, except for the provisions of the presently applicable law exempting homesteads from State taxation, and then apply the graduated percentage schedule contained in Schedule 22, as originally enacted, supra, or as amended, supra, whichever one was in effect in that year. For example, if the assessment was for the 1939 taxes — that is, taxes due on October 1, 1939, the assessments having been made during the fiscal year 1938-39 — you should go back to the collections on which the tax assessor's commissions were figured for that year, place the collections from taxes in litigation in the last bracket, and then apply the graduated percentage schedule contained in the original Section 22, supra, since that section was in effect at the time the assessment was made.

For the same reasons, in applying the above formula for computing the commissions of the tax collector on collections from taxes in litigation, you should follow the same procedure as in figuring the tax assessor's commission on collections from taxes in litigation, but with regard to the year in which the collections were made, rather than the year for which the assessments were made. For example, if the assessments were made for taxes due on October 1, 1939, during the year 1938-39, but the collection is not made until the fiscal year 1940-41, you should use the 1940 collections, placing the amounts collected from the taxes in litigation in the last bracket, and then applying the graduated percentage schedule contained in Section 161, as amended, supra, since it was in effect at the time the collections were made.

I trust that the above gives you the information which you desire. Had collections from taxes in litigation been considered in the two requests from you to which my opinion to you, supra, was in answer, I could have pointed out much more clearly in that opinion the method or manner of computing the commissions of the tax assessors and tax collectors on collections from taxes in litigation than I am now able to do, when considering the matter separate from other collections.

Schedule 22, as amended, supra, is codified in the Code of 1940 as Title 51, § 30, and Schedule 161, as amended, supra, appears as Title 51, § 191 thereof. This Code, as you know, becomes effective on May 31, 1941.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 27, 1941.

Hon. W. M. Cousins, Jr.,
Clerk, Circuit Court,
Elmore County,
Wetumpka, Alabama.

Peace Proceedings — Judges of Inferior Courts — Elmore County —

Judges of Inferior Courts in Alabama have jurisdiction of peace proceedings instituted under Chapter 204, Code of Alabama, 1923.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of May 21, 1941, in which you request an official opinion, is as follows:

"I would like your opinion on the following matter:

"Under the Local Acts of 1935 creating the Inferior Court of Elmore County, does the Court have jurisdiction in peace proceedings?"

If you intend to ask by your above inquiry if the Judge of the Inferior Court of Elmore County has jurisdiction of peace proceedings, my answer is in the affirmative. I call your attention to Section 5136, Code of Alabama, 1923, which is as follows:

"5136. Who are magistrates; authority to bind over to keep the peace. — The judges of the appellate and circuit courts, and courts of like jurisdiction, throughout the state, the judges of probate, the judges of the county courts, **judges of inferior courts,** and justices of the peace, in their

respective counties; and the mayor or chief officer of any incorporated town or city, within the limits of their respective corporations, are magistrates within the meaning of this chapter, and authorized to require persons to give security to keep the peace in the manner provided in the next article." (Emphasis supplied.)

You will note that Section 5136, supra, confers jurisdiction of peace proceedings under Chapter 204 of said Code on the judges of inferior courts of Alabama. The Inferior Court of Elmore County was established under Act No. 90, H. 387, approved May 29, 1935 (Local Acts, 1935, page 24). The Judge of said Court is, in my opinion, a judge of an inferior court within the meaning of Section 5136, supra.

I might add here that the Inferior Court of Elmore County does not have such jurisdiction, but the jurisdiction is conferred on the Judge of such court when sitting as a magistrate to hear such proceedings. Cf. **State v. Humphrey,** 125 Ala. 110, 27 So. 969.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 28, 1941.

Hon. E. W. Stewart,
License Inspector,
DeKalb and Cherokee Counties,
Fort Payne, Alabama.

Licenses — Exemption —

Fort Payne Athletic Association, a non-profit corporation, organized under Section 7190 of the 1923 Code of Alabama, is not liable for the payment of the 1941 license for operating a baseball park as provided under Schedule 8.1 of the 1935 Revenue Act.

Opinion by Assistant Attorney General Kohn.

Dear Sir:

Your request for official opinion of May 19, 1941 follows:

"The Fort Payne Athletic Association of this City is incorporated under the provisions of Sec. 7190 of the Code of Alabama, 1923. That is, they are incorporated as a non-profit organization formed for amusement and recreational purposes.

"They operate a baseball park in this city, and are in the North Alabama Baseball League. This league is amateur and players are not paid.

It is formed strictly on an amateur basis and has no professional standing. The association charges an admission for entrance to the park.

"Under Section 7192 of the Code of Alabama a corporation formed in good faith under Sec. 7190 is exempt from State, County, and Municipal taxes and licenses. Please advise me whether or not this association is liable for license for operating a ball park as provided in the Revenue Laws of Alabama."

It is my opinion that the Fort Payne Athletic Association, a non-profit corporation, organized under Section 7190 of the 1923 Code of Alabama, is not liable for the payment of the 1941 license for operating a baseball park as provided under Schedule 8.1 of the 1935 Revenue Act, which is as follows:

"Schedule 8.1. Each owner or lessee of a baseball park where admission fees are charged, in cities or towns of less than ten thousand inhabitants, or within five miles thereof, ten dollars; in cities or towns of ten thousand and less than twenty-five thousand inhabitants, or within five miles thereof, twenty-five dollars; in cities and towns of twenty-five thousand inhabitants and less than fifty thousand inhabitants or within five miles thereof, fifty dollars, in cities and town of fifty thousand inhabitants or more, or within five miles of any such city or town, one hundred dollars; provided that when baseball is allowed by law to be played in any city or town on Sunday, the license therefor in such city or town shall be double the amount hereinbefore named; provided that this schedule shall not apply to baseball parks owned or maintained in good faith by educational institutions located in this State, provided that the provisions of this act permitting the payment of a half-year license after April first shall not apply to this schedule."

The 1941 license was due and payable on October 1, 1940 and delinquent on November 1, 1940.

Section 7192 of the 1923 Code of Alabama provides as follows:

"§7192. **Exemptions from taxation and license.** — The property of corporations formed in good faith hereunder for other than pecuniary purposes and not for individual profit shall be exempt from all state, county and municipal taxation and licenses; but if used for any other purpose than legitimately pertains to the object of such society, it shall not be so exempt."

In my opinion, the Section supra, expressly exempts the Fort Payne Athletic Association from the payment of all state, county and municipal taxes and licenses.

This office in an opinion to Hon. John C. Curry, Commissioner of Revenue, State of Alabama, under date of March 14, 1940 (Quarterly Report, Attorney General, Vol. XVIII, page 319) held that corporations of a benevolent, educational or religious character, organized under the provisions of Article 23, Sections 7167-7192 of the Code of 1923 are not liable for the payment of annual corporation permit fees imposed by Section 3162 of the Revenue Act

of 1935; also in an opinion to Hon. Howell Turner, Secretary of State, Capitol, under date of August 17, 1937 (Quarterly Report, Attorney General, Vol. VIII, page 121) held that social clubs organized under Article 23 (§§ 7167-92 of the Code) do not come within the provisions of Section 6975 of the Code, providing for a statement to be filed with the Secretary of State.

The Fort Payne Athletic Association will not be exempt from the payment of the 1942 license due and payable October 1, 1941, as I have been unable to find any such exemption in the new code, which will take effect on the 31st day of May, 1941.

Section 7192 of the 1923 Code has been rewritten and brought forward in the new code as Title 51, §12, which provides as follows:

"§12. Y. M. C. A. — All real and personal property of all Young Men's Christian Associations, and of any branch or department of same, heretofore or hereafter organized and existing in good faith in the State of Alabama for other than pecuniary gain and not for individual profit, when such real and personal property shall be used by such associations, their branches or departments in and about the conducting, maintaing, operating and carrying out of the program, work, principles, objectives, and policies of such associations, their branches or departments, in any city or county of the State of Alabama, is exempted from any and all state, county, and municipal taxes, licenses, fees and charges of any nature whatsoever. The clause, 'for other than pecuniary gain, and not for individual profit', as used in this section shall not include any fee, admission, service charge or dues assessed, charged or collected by said associations, their branches or departments from any person, or persons, for any service rendered by such associations, their branches or departments, or for the use or occupancy of any of the real or personal property of said associations, their branches or departments."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 29, 1941

Hon. Fred Posey, Clerk,
Civil and Criminal Court,
Autauga County,
Prattville, Alabama.

Trial tax — Inferior Court of Autauga County —

There can be no trial tax charged in any civil case which is tried in the Inferior Court of Autauga County, Alabama.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

Your letter of May 19, 1941, in which you request an official opinion, is as follows:

> "Please look in Local Acts 1935, page 82, No. 158, H. 548, Doster, and give an opinion on whether or not a trial tax is to be charged on Civil cases."

My answer to the above is in the negative. You will note that the provision of law under which this tax is imposed is Section 9 of the Revenue Act of 1935 (Act No. 194, H. 324, approved July 10, 1935, General Acts, 1935, page 256, at page 263), which reads in part as follows:

> "A trial tax of three dollars ($3.00) be, and the same is hereby imposed on each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of the circuit court of this state, to be taxed and collected as other costs."

It is evident that the general provision of the act, supra, has reference to cases in the Circuit Court and no others and does not apply to such courts as the "Inferior Court of Autauga County, Alabama." I find no provision authorizing the collection of such a tax in a civil case in the act creating the Inferior Court of Autauga County. The reference to a "trial tax" in Section 15 thereof is not, in my opinion, sufficient to warrant the charge of a trial tax in civil cases in said court. Quarterly Report of Attorney General, Volume XV, page 274; Quarterly Report of Attorney General, Volume XXI, page 58.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 29, 1941.

Hon. T. M. Perry, President,
Board of Revenue, Marengo County,
Linden, Alabama.

Officers — Members of County Board of Public Welfare — Removal —

A member of a county board of public welfare may be removed only by impeachment, and cannot be removed by the appointing authority, the county governing body, since the statute provides a fixed term of office.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion under date of May 14, 1941, is as follows:

"Mrs. Emma C. Johnson was appointed as a Member of the Board of the Department of Public Welfare by the Board of Revenue of Marengo County, Alabama, her appointment as such member expiring in 1943.

"It is our understanding that the power to appoint an officer carries with it the right to remove such officer if there is no constitutional or statutory restraint.

"Will you please be so kind as to render us an opinion as to whether or not there is any constitutional or statutory provision controlling the appointment that would prevent the removal of such officer from said Board before the term of her office expires, and whose duty it is to remove her."

It is my opinion that a member of the Board of the Department of Public Welfare of Marengo County may be removed only in the manner provided by Sections 4497, et. seq., of the Code of Alabama, 1923, i. e., by impeachment.

The members of the County Board of Public Welfare in each county are appointed pursuant to Section 11 of Act No. 332, S. 365, approved August 27, 1935 (General Acts, 1935, page 762, 766), which, as pertinent, is as follows:

"Section 11. The County Board of Public Welfare shall consist of seven members, not less than two of whom shall be women, selected by the County Court of Commissioners or County Board of Revenue or other governing body of the County from the citizenship of the county on the basis of their recognized interest in the public welfare, provided that in counties in which there are cities having a population of sixty thousand or more, according to the last Federal Census, the city commission or other governing body of the city shall have equal authority with the County Board of Revenue or other governing body of the County in selecting the membership of the County Board of Public Welfare. Members of the County Board shall serve for terms of six years."

You will observe that the term of office of each of the members of the County Board is definitely fixed by the statute at six years.

The statute, although it fixes a specific term, contains no provision for the removal of the Board member. It is, therefore, necessary to resort to the case law to determine the authority vested with the power to remove these members.

The general rule is that where no definite term of office is fixed by law the power to remove an incumbent is an incident to the power to appoint, in the absence of some constitutional or statutory provision to the contrary. **Touart v. State,** 173 Ala. 453, 56 So. 211; **Jefferson County v. O'Gara** (Ala. App.), 195 So. 267, 272, c. d. 239 Ala. 3, 195 So. 277. See, also, 22 R. C. L. 562, Section 266, n. 3; 46 C. J. 985, Section 146, n. 76.

But where a fixed term is assigned to the office, the appointing authority has no absolute power of removal. **Throop on Public Officers,** 353, Section 354, n. 2; **Mechem On Public Officers,** 284, Section 445, n. 2, 3; also page 287, Section 454, n. 3.

Many authorities are collected in **Adie v. Mayor of Holyoke,** 21 N. E. 2d. 377, 380 (Mass.), supporting the rule that the right of removal does not exist in the appointing power, in the absence of some constitutional or statutory provision, where the term of the official is fixed by law for a definite period. See, also, 46 C. J. 985, Section 146, n. 78; 22 R. C. L. 562, Section 266, n. 6.

From what has been said, it may be stated that since the statute has provided the member of the Board with a fixed term of office she may be removed only in the manner provided by statute for her removal therefrom.

It cannot be questioned that a member of the County Board of Public Welfare is a public officer, since, without doubt, such member is "executing an agency of the State under the authority of a public law." **Jefferson County v. O'Gara,** supra; **Jeffers v. Wharton,** 197 So. 352. That she is a "county officer" seems to be settled by the opinion of this office to the State Highway Planning Survey under date of September 20, 1937 (Quarterly Report of Attorney General, Volume VIII, page 263).

As noted above, Section 4497 authorizes the removal by impeachment of all county officers for the causes mentioned in said section. The procedure for the removal is provided in the subsequent sections, and it is my opinion that a member of a county board of public welfare may not be removed only in accordance with this procedure. Cf. **Bradford v. State ex rel. Esslinger,** 226 Ala. 342, 147 So. 182.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 29, 1941.

Hon. Henry W. Smith,
Sheriff, Etowah County,
Gadsden, Alabama.

Gambling Devices —

General rules to be followed in determining what devices may and may not be operated under the Anti-Gambling Device Act of 1931 (Act No. 671, H. 423, approved July 25, 1931, General Acts, 1931, page 806), stated.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for an official opinion of recent date is as follows:

"Please render me your official opinion clarifying certain of the provisions of the Act appearing in the General Acts of 1931, at page 806, and sometimes known as the Anti-Gambling Device Act.

"1. Can you give me the distinction between the term 'game of chance' as used in Section 1(d) of the Act and a game of skill?

"I notice that in subsection (b) of Section 1 of the Act, the Act distinguishes between a machine or device where the result of winning or losing depends upon 'chance, lot or luck', as distinguished from one in which the will or skill of man can influence the result of winning or losing. Is a game, the result of which depends on the will or skill of man, which is so designed that the owner or proprietor can not adjust the same, so as to offset, upset, or destroy the skill of the person playing the same, a game of skill or a game of chance?

"2. Does Section 1(d) of the Act make illegal all games of skill or all amusement devices, upon which wagers are not only actually placed, but upon which it is humanly possible for wagers to be placed?

"As I understand the Act, it defines as a gambling device anything which 'can be operated as a game of chance.' Does this mean a device, the result of which can be made to depend merely upon luck or does it mean anything upon which it is humanly possible for wagers to be placed? For instance, is a football game made a 'game of chance' because it is possible for wagers to be placed upon the respective skill of the teams engaged? Is a game of golf a 'game of chance' because it is possible for wagers to be placed upon the respective skill of the players? Is a bowling alley a game of chance merely because it is possible for wagers to be placed upon the respective skill of the players?

"3. Is an amusement device which is not designed for gambling and which is not used for gambling, the action of which depends not upon luck, lot or chance but upon the skill of the operator, a gambling device prohibited by Section 1(d) of this statute?

"What is the distinction between a full-sized bowling alley in which the result depends upon the skill of the operator, and a miniature bowling device, likewise charging a fee for playing a game, operated by levers, where the score depends upon the skill of the operator manipulating the levers? What is the distinction between a shooting gallery which charges a set sum for a certain number of shots, and a mechanical shooting device charging a certain sum for a certain number of shot, shooting at an image of a miniature airplane thrown upon a screen by an electrical device, where neither prize nor reward is offered for the success of the contestant in making a certain score?

"4. Is an amusement device which does not pay off automatically or indicate a pay off should be made to anyone playing, but on the contrary

shows by a sign displayed on the same that the player will receive no reward of either money or property, and which depends upon the skill of the person playing the same, being so designed that the owner or proprietor or person having charge of the same can not adjust the same so as to offset, upset or destroy the skill of the person playing same, a game of chance?

"5. Is an amusement device a violation of subsections (a), (b), (e), or (h), of Section 1 of the Act when no cash, property, merchandise, or other article of value are offered by the proprietor or hazarded by the player on the outcome of the game or the use of the device?

"I am told certain types of amusement devices have an automatic mechanism that permits the person operating the same to play another game on the machine (without the necessity of inserting another coin) if he should attain a certain score by exhibiting sufficient skill; there being no way in which the machine will pay off or indicate a pay off should be made in cash, property, merchandise or other articles of value.

"Does the offer by the proprietor or owner of the machine to permit the player to play another game on such a machine without charge if he should exhibit a certain skill in making scores on said machine, constitute the hazard of money or property or the winning of money or other things by chance or hazard, as prohibited by said statute?

"As the type and nature of the various amusement machines and devices vary as new models are placed upon the market, in rendering your opinion, please give me as far as possible a clear set of guiding principles which I may follow in determining the legality or illegality of any machine or game now on the market or with which I may be faced in the future."

The questions presented in your letter of inquiry have been frequently presented to the Courts of last resort of this nation, and from these decisions, a great number of which have been read in an attempt to properly answer your inquiries, I shall attempt to evolve some general rules which, when applied to your particular inquiries, should afford you the desired information. I shall not follow the order in which your questions are propounded in discussing the question, but will rather attempt to draw certain conclusions from the cases and then advise you specifically.

The act concerning which you desire information is Act No. 671, H. 423, approved July 25, 1931 (General Acts, 1931, page 806). Sections 1 and 2 of this Act are as follows:

"Section 1. DEFINITIONS. — That the term gambling device shall include and be deemed to embrace the following: (a) Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, in the use of which a consideration is paid or deposited, and there is gambling or the hazarding of small amounts of money or property to win larger amounts of money or property. (b) Any machine, mechanical device, contrivance, appliance or invention, whatever its name or

character, which determines the result of winning or losing money or property by chance, lot or luck, in which neither the will nor skill of men can operate to influence the result of winning or losing. (c) Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, for the division of or distribution of either money or articles of personal property, where said distribution or division is to be determined by lot or chance amongst those who take shares or are interested in the scheme. (d) Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, which is operated or can be operated as a game of chance. (e) Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, where money or property is hazarded on chance, or risked on an uncertain event. (f) Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, into which money is placed or deposited upon chance or upon the result of the action of such machine, mechanical device, contrivance, appliance of (sic) invention. (g) Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, which dispenses to the player or operator of the same any package of merchandise and also gives the player or operator the chance of placing himself in a position where his next succeeding play will assure him of a return of several times the value of the coin placed therein by him. (h) Any machine, mechanical device, contrivance, appliance or invention, whatever its name or character, intended for the purpose of winning money or any other thing by chance or hazard. (i) Any machine, mechanical device, contrivance, appliance or invention used or intended to be used as a substitute for, or in place of, any machine, mechanical device, contrivance, appliance or invention described and enumerated in paragraphs (a), (b), (c), (d), (e), (f), (g), and (h) of this Act.

"Section 2. MACHINES OR DEVICES NOT REGARDED AS UNLAWFUL — The Provision of this Act shall not apply to any machine, mechanical device, contrivance or invention by which merchandise is dispensed in a uniform quantity to each purchaser, although the price may be deposited in a slot in such machine, mechanical device, contrivance, appliance or invention, provided such machine or device can not be played for money, property, checks, credits, or any other representative or token of value. Nor shall the provisions of this Act apply to machines or devices where the element of chance is wholly absent, as where the machine or device indicates with absolute certainty, before the player deposits his coin or check, what he will receive from the machine, mechanical device, contrivance, appliance or invention."

A careful examination of the sub-divisions of Section 1 reveals that the Legislature, in defining a "gambling device," has placed such devices into two categories. First, certain of the sub-divisions contemplate schemes or devices by which or upon the operation of which, prizes are distributed by chance or hazard, without regard to whether such prizes be in the form of money, property or any other thing.

All the sub-divisions of Section 1, with the exception of Sub-division (d), apply to schemes or devices of this type, and will be hereinafter referred to as "category I."

Sub-division (d) treats a scheme or device of a different type, that is, one "which is operated or can be operated as a game of chance." This differs from the first category in that under it it is not necessary that a prize be distributed to render the device illegal. More will be said of this second category hereinafter, and it will be styled "category II."

Adverting to the first category, we find the cases almost in accord in holding that devices (and when the word "devices" is employed in this opinion it is intended to include any "machine, mechanical device, contrivance, appliance or invention whatever its name or character," as used in Act No. 671, supra) which dispense money, property, or any other thing are illegal under statutes such as the one at hand. We find these conclusions reached without regard to whether the machine itself awards the prize by awarding tokens, prizes, etc., or whether the operator of the machine awards the prizes upon the presentation to him of tokens or other information indicating that a certain score has been made, **State v. Pollnow,** 14 S. W. 2d. 574 (Mo), or whether the prizes awarded as the result of chance consist of additional amusement merely, such as "free play" devices, or any other scheme by which the machine yields or might yield something other than the pleasure which the player derives from watching the movement of the ball or other movement of the machine.

In order that these conclusions may be made clearer, your attention is called to a few of the many cases which have been studied in this connection.

The Supreme Court of Missouri, in **City of Moberly v. Deskin,** 155 S. W. 842, 844, has held that the mere fact that a package of gum was given each time a nickel was dropped in a slot machine did not give an innocent character where the machine also gave trade checks valued at from ten cents to one dollar to a lucky player, the Court stating:

> "It is not essential that one of the parties to the wager stands to lose, that chance taken by the player may be winning it all on the throw, or in the amount to be won or lost, and the transaction shall be denounced as gaming whenever the player hazards his money on the chance that he may receive in return money or property of greater value than that he hazards. If he is offered an uncertain chance of getting something for nothing the offer is a wager, since the operator offers to bet that the player will lose and in accepting the chance the player bets that he will win."

The Supreme Court of Arkansas, in **Howell v. State,** 40 S. W. 2d. 782, citing numerous cases, including **State v. Marvin,** (Iowa), 233 N. W. 486, **Harvie v. Heise,** (S. C.) 148 S. E. 66, concludes that a "Mills Mint Vending Machine" which delivered mints and at irregular intervals checks which caused the machine to display pictures was illegal, stating:

> "The machine is usually held to be a gambling device where its operation is such that, although player in any event will receive something, 'he stands a chance to win something in addition.'"

A similar device was held illegal by the Supreme Court of New Mexico in **Territory v. Jones,** 99 P. 338.

The Supreme Court of Missouri, in the case of **State v. Joynt,** 110 S. W. 2d. 737, considered a machine operated by inserting a coin in the slot causing the rotation of a disk where, on the stopping of which by the patron a metal arm was caused to move automatically, which arm in turn caused the deposit of an article of merchandise, worth more than the coin into a chute. The Court held this machine illegal, and in the opinion we find a statement which is typical of the reasoning of the Courts which have considered devices such as that outlawed by the first category of Act. 671, discussed above. The Court states:

> "The device offers a chance of winning more than the sum ventured. The chief element of gambling is the chance of winning or losing. The owner is certainly not distributing merchandise for less than its value, therefore it is evident that the chances of one playing this device of obtaining one of the articles of merchandise must be greatly against him and in favor of the owner. It is clearly apparent that the dominating element of this device is that of chance, and therefore it is gambling device."

This reasoning is particularly pertinent and should be adopted by you when you are called upon to consider whether a given machine is or is not prohibited by Act. No. 671.

Another device which has been held illegal under statutes similar to "category I" of Act No. 671 is a slot machine known as an "Erie Digger". This device had a miniature shovel on top to pick up candy and small objects after the insertion of a coin.

In concluding that this device was illegal the Court remarked:

> "What one got was matter of chance. What one paid for, in part at least, was the fun of seeing what one got." **Commonwealth v. Ward,** (Mass) 183 N. E. 271.

Another type "Claw Machine" was held illegal in the United States District Court of Appeals for the District of Columbia in **Boosalis v. Crawford,** 99 Fed. 2d. 374, and a "Crane Device" was held illegal by the Criminal Court of Appeals of Oklahoma in **MacKay v. State,** 83 P. 2d. 611, the Court there making the point that one of the strongest attributes which entered into determining whether the machine was legal or illegal was whether the player secured the full value of the money invested on each play. The Court quoted from a former decision in **Nelson v. State,** 256 P. 939, wherein it was stated:

> "That is what the record in this case shows; that is, that the player was induced to believe that, if he played the machine with nickels long enough, he would finally get some checks which he could use for the purpose of playing the machine for amusement, and the amount of checks is dependent upon conditions over which he has no control. If the act in question applied only to things of value, we think that the amusement held out as an inducement is a thing of value sufficient to bring this machine within the plain provisions of the act. We are of the opinion that the act is applicable without regard to the value of the things held out as an inducement to the playing of the machine."

It will be seen from the foregoing decisions that even though the prize awarded is nothing other than "a key to added amusement," such a device is nonetheless illegal.

This brings us to a consideration of the so-called "free play" devices. These devices are generally so constructed that the player has the chance to obtain a number of free games, depending upon the score achieved. In the cases involving this type of machine, which is most often of the construction known to the trade as a "Pin Ball Machine," the facts presented to the Court almost always advise the Court that the machine is equipped with a notice advising the player that the game is for amusement only — not gambling; that there is another notice advising the player that further games may be had if the player obtains a certain score, and that these free games permit the player to play the machine without further charge; that these free games will not be exchanged for their equivalent value in money, and that there is no pay-off made, other than by such free games, either directly or indirectly, in connection with the operation of the machine. The Courts have declined to accede to the contention that such machines are legal.

Characteristic of the viewpoint expressed in the opinions is that found in **People v. Cerniglia,** 11 N. Y. S. 2d. 5, 7, wherein the Court cogently observes:

> "This court is not misled by the apparent harmlessness of awarding a free game. This is but an incentive that fosters the gambling spirit similar to that awarding tokens, prizes, etc. The element of chance is always present. 'Combining the element of chance with the inducement of receiving something for nothing results in gambling *** .' A 'thing of value' to be the subject of gaming may be 'any "thing" affording the necessary lure to indulge the gambling instinct.' "

This decision is not without its counterpart in other jurisdictions. For instance, the Supreme Court of Ohio, in **Kraus v. City of Cleveland,** 19 N. E. 2d. 159, in holding a free play device illegal, noted that:

> "Since amusement has value, and added amusement has additional value, and since it is subject to be procured by chance without the payment of additional consideration therefor, there is involved in the game three elements of gambling, namely, chance, price and a prize."

A similar conclusion has been reached by the Supreme Court of Wisconsin in **City of Milwaukee v. Burns,** 274 N. W. 273, and by the Supreme Court of South Carolina in **Alexander v. Martin,** 6 S. E. 2d. 20, 23. In the Martin case, the Court, after noting that the player, depending upon the score recorded, secures additional free games, concludes:

> "Therefore, it is clear that the lure and inducement to the player to operate the machine is the chance of occasionally being allowed to operate a game or games without additional cost. This feature, we think, clearly pertains to a game of chance. And this is true, whether the machine is played for amusement or for other returns, such as money."

See, also, **Henry v. Kuney (Mich.),** 273 N. W. 422.

Additional cases are collated in 81 A. L. R. 177.

Thus far, therefore, it may be concluded that even though the prize awarded by chance by the machine is only the opportunity to secure addition-

al amusement, the machine is nonetheless a prohibited one under the statutes.

Among other cases holding that devices which stimulate a desire to take a chance in the hope of obtaining an article of considerable value by risking a small sum of money are illegal is **State v. Randall** (Ore.), 256 P. 393 (holding a game of throwing balls into a divided box for prizes illegal). Here again we find an indication of the process of reasoning of the Courts in considering schemes such as this. Witness the following observation:

> "It would be difficult to see for what reason a game could be conducted profitably, if prizes of the value of these, as shown by the testimony to have been, were merely given as a reward for skill *** . While it is not a very thrilling form of a game of chance, we think it is undoubtedly a gambling game and a game calculated to stimulate in the minds of the young people, especially, a desire to take chances in the hope of obtaining an article of considerable value by risking a very small sum of money."

In **Redd v. Simmons** (Miss), 167 So. 65, certain "Pin Marble machines" were held illegal, among them being the one known as the "Forward Pass" device.

The Supreme Court of Florida, in two recent decisions, **Weathers v. Williams,** 182 So. 764, and **Eccles v. Stone,** 183 So. 628, has concluded that "Marble Pin Games", wherein the directions and speed of the marble, after being released by the player by the operation of a plunger, is caused to strike pins or bumpers or other such devices, are illegal as "adopted and fit for fast, easy gambling." Similar devices have been outlawed by the Court of Civil Appeals of Texas in **Adams v. Antonio,** 88 S. W. 2d. 503, 505; **Barkley v. Conklin,** 101 S. W. 2d. 405, and **Houghton v. Fox,** 93 S. W. 2d. 781. The Supreme Court of Arkansas has outlawed similar devices in **Steed v. State,** 72 S. W. 2d. 542, and in **Howell v. State,** 40 S. W. 2d. 782, the Court concluding:

> "We might add that they are gambling devices per se because the only reasonable and profitable use to which they may be put is the use in a game of chance."

Following these cases, the Supreme Court of Arkansas in **Stanley v. State,** 107 S. W. 2d. 532, has held a novelty baseball game machine known as "Home Run" illegal.

A baseball game of a different type, this one, known as "World Series," having numerous holes on the playing surface, and having metal players in the nature of pins, and arches in front of the metal players, as well as on other parts of the playing surface to simulate a baseball game has been held illegal by the Appellate Court of Illinois for the First District in **Silfen v. City of Chicago,** 19 N. E. 2d. 640 (Ill.)

From all of these cases, I think the conclusion can be safely drawn that where the machine affords an opportunity to hazard a small sum of money on the chance of winning some prize, whether the prize be amusement, money, or property, and whether the prize be awarded by the machine itself or by someone connected with its operation, such machine is illegal under Act. No. 671.

But there remains yet another type of machine which is characterized by those features delineated in sub-division (d) of Section 1 of Act No. 671, and which I have described above as being in "category II." That machine is one "which is operated or can be operated as a game of chance." As noted hereinabove, it is not necessary that a prize be awarded by the machine itself in order for it to be a gambling device under this definition.

However, attention is called to Section 2 of the Act which must also be considered in arriving at a proper interpretation of Section 1 (d). Section 2 excepts from those machines or devices which should be regarded as unlawful, machines or devices "where the element of chance is wholly absent, as where the machine or device indicates with absolute accuracy, before the player deposits his coin or check, what he will receive from the machine *** ." Particular attention is directed to the fact that the Legislature has provided that machine shall be legal "where the **element of chance is wholly absent.**"

This provision would at first blush indicate that the Legislature intended to make illegal every game of whatever type or description in which the element of chance existed even in the most minute degree. However, I do not think such a construction can properly be placed on the language. There is hardly a game of chance known to man which is purely skill, where the element of chance has no place.

It is a well settled rule of statutory construction that words of a statute should be given their natural, plain, ordinary and commonly understood meaning in the absence of it clearly appearing that a different sense was intended; **Ex Parte Pepper,** 185 Ala. 284, 64 So. 112; **City of Wetumpka v. Winter,** 29 Ala. 651; **Board of Education of Jefferson County v. State,** 222 Ala. 70, 131 S. 239. And that statutes should receive a sensible construction such as will, if possible, avoid absurd or unpractical results. See numerous cases collated in 18 Ala. Dig. Statutes, Key No. 181 (2).

I am inclined, therefore, to attribute to the Legislature an intention to prohibit those machines which are operated or can be operated as a "game of chance" as those words are commonly understood.

Corpus Juris (27 C. J. 968, 969, Sec. 4) defines a game of chance in this language:

> "It is a game determined entirely or in part by lot or mere luck, in which judgment, practice, skill or adroitness have honestly no office at all or are thwarted by chance; a game in which hazard entirely predominates."

Black's Law Dictionary (Third Edition, page 835) defines games of chance as follows:

> "One in which the result as to success or failure depends less upon the skill and experience of the player than upon purely fortuitous or accidental circumstances incidental to the game or the manner of playing it or the device or apparatus with which it is played, but not under the control of the player. A game of skill, on the other hand, although the element

of chance necessarily cannot be entirely eliminated, is one in which success depends primarily upon the superior knowledge, attention, experience and skill of the player, whereby the elements of luck or chance in the game are overcome, improved, or turned to his advantage."

This rule that the "test of the character of the game is not whether it contains an element of chance or an element of skill, but which is the dominating element that determines the result of the game," first appears to have been announced in the leading case of **State v. Gupton,** 30 N. C. 271, 8 Ired. 271, and is restated at length in **People ex rel Ellison v. Lavin,** 71 N. E. 753, 755 (N. Y.).

In short, it will be seen that it is the character of the game and not the skill or want of skill of individual player which in the end determines whether the same is one of chance or skill. Cf. **Engle v. State,** 90 P. 2d. 988, 993.

The test as to whether chance predominates over skill is not the only test of whether a particular game is a "game of chance." Thus, the alternative test is also stated in the cases that where the element of chance is present in such a manner as to thwart the exercise of skill or judgment in a game, then the game may be a "game of chance." This test is in harmony with the rule that a result is determined by chance where it is determined "by means making the result independent of the will of the manager of the game." **Commonwealth v. Plissner** (Mass.), 4 N. E. 2d. 241, 245. Cf. **Howle v. City of Birmingham,** 229 Ala. 66, 159 So. 206.

To illustrate this test it may be said that although the operation of the machine or device may depend in part upon the skill of the operator (as where the distance to which the plunger is pulled back or the aim of the operator affects the outcome in some manner), where there are arches, pins, springs, bumpers, or other devices upon the face of the instrument to control, deflect or impede the direction or speed of the ball or other indicator, the machine or device will nevertheless be held illegal, for the control over the machine by the player has ceased after a certain point in the operation of the machine, and the ultimate result depends upon chance. Cf. **Commonwealth v. Plissner, supra; Silfen v. City of Chicago, supra.**

Of course, a machine is nonetheless a "game of chance" because skill is a factor in the player's success. If the **amount** of the player's winnings, if he is successful, depends entirely on chance, the machine is a "game of chance." Cf. **State v. Livingston** (Me.), 196 At. 407. An example of such a machine is the "Ten Grand Pin Game" considered by the Supreme Court of Maine in the Livingston case. The objectionable feature of the operation of this machine is briefly described by the Court as follows, after first describing the physical characteristics of the machine, which consists of the usual type pin ball plunger which releases a steel ball which runs out on the board of the machine:

"A device under the machine, which in no way can be controlled by the operator, may or may not, depending on chance, so far as the operator is concerned, illuminate a number on the shaft of an arrow set in the machine. If a number is illuminated, the player may win certain to-

kens good for trade, if he can put a ball in the hole numbered 10,000, or one in the hole numbered 2,000, and one in the hole numbered 3,000. If no number is illuminated, tokens may be won by putting one ball in the 2,000 hole and the other in the 3,000 hole. The 10,000 hole is the easy one to shoot for. If the player wins, the machine ejects the number of slugs shown by the illuminated number. It may be readily seen to what an extent chance plays a part in the winning of the tokens. In the first place, the lighting of a number by a mechanism which is entirely beyond the operator's control determines whether or not the operator may have the easy chance to put a ball in the 10,000 hole; in the second place, the number of the tokens which the operator will receive is entirely determined by chance."

The Supreme Court of Kentucky, in **Commonwealth v. Bowman,** 102 S. W. 2d. 382, considering a similar device, notes:

"Notwithstanding any question of skill in the operation of the machine, the element of hazard and chance still remains. **There is quite a difference between a prize for skill and a hazard or chance on skill.** (Emphasis supplied)

From the foregoing cases and rules, it may be concluded that given a lawful end, to wit, a game of skill, the mere fact that the machine or device possesses innocent means for the accomplishment of illegal purposes, i. e., that two or more players might possibly use the machine as an instrument upon which to gamble, would not in and of itself make the machine or device illegal. As long as the machine is not a "game of chance" per se, if, as and when you, as Sheriff, secure evidence to show that the machine or the proprietor by the award of money or merchandise has converted the machine, or when you secure evidence to show that persons were gambling on the machine, then, and not until then, the players and the proprietor have violated the law. Cf. **Mills Novelty Co. v. Farrell,** (District Court Conn.) 3 Fed. Sup. 555, 558; **State v. Humphries** (N. C.), 186 S. E. 473, 479.

So, it has been held in **People v. Cohen,** 289 N. Y. S. 397, that a slot machine commonly called the "Electric Eye" operated by inserting a coin in the slot and pulling a trigger of a pistol which shoots an electric beam at a target, requiring skill in proper timing and aiming "is a game of skill, ability, and that it is not prohibited by law."

Summary

Summarizing, we may conclude that the following devices are illegal under the Act No. 671, supra:

1. Devices which stimulate a desire to take chances in the hope of obtaining an article of larger value by risking a small sum of money, whether such "article" be money, property or amusement.

2. Devices awarding free plays, even if the operation is predominated by the skill of the player, where the number of free plays awarded depends on the action of the machine. Cf. **State v. Livingston** and **Commonwealth v. Bowman,** supra.

3. Devices commonly known to the trade as "Pin Ball Machines," however designed, and regardless of whether there is a "pay-off" or not, where the element of chance is present to such an extent as to thwart the exercise or skill or judgment, i. e., where arches, pins, springs, bumpers, or other interfering devices deflect or impede the direction or speed of the ball or other indicator, thus causing the player to lose control of the operation of the machine after a certain point in its operation, to the end that the ultimate result is made to depend on chance, not skill.

4. Generally, all devices in the operation of which chance predominates over skill, including those devices which can be adjusted so as to offset the ability or skill of the experienced player.

The following devices may be lawfully operated under Act No. 671, supra:

1. Those devices named in Section 2 of the Act.

2. Devices which, even though operated by lever or plunger, allow the result to be entirely within the control of the skill of the player. An example of such a device would be the "Bowling Alley Machine," referred to in your letter of inquiry, where the operator of the device has full control of the ball released by the machines from the time such ball leaves the operating lever to the time when the bowling pins are hit, there being no interfering pins, bumpers, or other devices between the lever and the bowling pins. It is, of course, assumed that this type of machine has no "pay-off" device of any kind. Cf. Opinion to Hon. W. L. Borders, Sheriff, Calhoun County, dated March, 1941.

3. Devices of the target type, such as the "Electric Eye" device described in **People v. Cohen,** 289 N. Y. S. 397, supra.

In my judgment the cases decided by the Supreme Court of Alabama are in accord with the foregoing conclusions.

In **Howle v. City of Birmingham,** 229 Ala. 666, 159 So. 206, the Court considered certain "Pin Ball Machines" and held that the game was a "game of chance" for the reason that the machine could be adjusted so as to offset the touch of trained or experienced players. It will be noted that the Court recognizes the distinction under the Act between a "game of chance" and a "game of skill."

In the case of **One Penny Marble Machine v. State,** 233 Ala. 678, 173 So. 91, Mr. Chief Justice Anderson, speaking for the Court, held that the facts in the agreed statement of facts "failed to show it (the device in question) was then being operated as a game of chance, but it was open to the trial court to find that it could be so operated." This case involved a "Pin Ball Machine," thus indicating that the Supreme Court of Alabama, as well as the nisi prius courts, have construed Act No. 671 as making illegal devices which, while possibly requiring some skill in operation, nevertheless destroy the "skillful touch" of the player by the subsequent interference of pins, bumpers, springs, ect.

A conclusion similar to that reached in the **One Penny Marble Machine** and **Howle** cases has been reached by the Court of Appeals in **Kropp v. City of Tuscaloosa,** 197 So. 91.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

NOTE: The foregoing opinion was prepared prior to the release of the opinion of the Supreme Court in **State v. One 5c Fifth Inning Base Ball Machine, etc.,** 6 Div. 806 (M. S.), and the conclusions above reached find additional support in the opinion of the Supreme Court in that case.

May 30, 1941.

Hon. J. F. Laseter,
Judge of Probate,
Barbour County,
Clayton, Alabama.

Judge of Probate — Marriage —

Probate Judge entitled to a fee of $1.50 for celebrating the rites of matrimony.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of May 16, 1941, is as follows:

"By Section 7285 Code of 1923, Vol. 3, near bottom of page 596, among the fees allowed to Judges of Probate is Celebrating rites of matrimony ..... $1.50.

"By section 9005 of the same Code, it is provided that any Judge, Justice of the Peace, or licenses minister of the gospel celebrating the rites of matrimony is entitled to two dollars.

"Please advise me what amount is the correct fee, that I am authorized to charge, as Judge of Probate, for such service."

It is my opinion that you are entitled to a fee of $1.50 for celebrating the rites of matrimony.

The forerunner of Section 9005 of the 1923 Code first appeared as a statute in the Code of 1852 as Section 1959. This section has come down to the

Code of 1923 without change. It is not changed by the 1940 Code which is to become effective May 31, 1941.

Section 9005, supra, is as follows:

"§9005. Fees for marrying.—Any judge, justice of the peace, or licensed minister of the gospel, celebrating the rites of matrimony, is entitled to two dollars."

The provision in Section 7285 of the 1923 Code allowing the Probate Judge a fee for celebrating the rites of matrimony first appeared in the 1876 Code. In that Code the fee was fixed at $2.00. However, in the next Code, the Code of 1886, the fee was changed to $1.50. It has remained at this figure in each succeeding Code.

The reduction of the fee in this section, the forerunner of Section 7285 of the 1923 Code, from $2.00 to $1.50 clearly indicates, in my opinion, that the legislature intended for the Probate Judge to receive a fee of $1.50 rather than the $2.00 fee provided for other judges, etc. The history of a statute may be viewed in order to arrive at the legislative intent. **Abramson vs. Hard,** 229 Ala. 2, 155 So. 590.

Furthermore, it is a well settled principle that the law of costs and fees must be strictly construed. Code of Alabama, 1923, Section 7255; **Troup v. Morgan County,** 109 Ala. 162, 19 So. 503; **State v. Stone,** 233 Ala. 243, 171 So. 366, and that special provisions relating to specific subjects control general provisions relating to general subjects, and things specially treated will be considered as exceptions to general propositions. **Herring v. Griffin,** 211 Ala. 225, 100 So. 202.

A special provision of the statute will control one which is general. **City of Birmingham v. Southern Express Company,** 164 Ala. 529, 51 So. 159; Alabama Digest Statutes, Key No. 225½.

Therefore, in view of the foregoing rules of statutory construction, and the history of the two sections as shown above, it is my opinion that Section 7285 of the Code of Alabama, 1923, relating specifically to fees of probate judges, and providing a fee of $1.50 for celebrating the rites of matrimony, would prevail over Section 9005 of the Code of Alabama, 1923, which provides that any judge, justice of the peace or licensed minister of the gospel is entitled to $2.00 for celebrating the rites of matrimony. Quarterly Report of Attorney General, Vol. VI, page 140.

The opinion of the Attorney General to Hon. J. Lee Smith, Judge of Probate, Chilton County, rendered under date of November 18, 1935 (Quarterly Report of Attorney General, Vol. I, page 185; Biennial Report of Attorney General, 1934-36, page 380), and other opinions of this office are modified insofar as they conflict herewith.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 30, 1941.

Hon. W. S. Coleman, Chairman,
Board of Commissioners,
Anniston, Alabama.

Counties — Municipalities — Police Power — Licenses — Building Permit Fee — Jails —

A city is powerless to enforce a police regulation against a county where the State has acted in the exercise of its sovereign police power in the same instance.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of May 3, 1941, in which you request my official opinion as follows:

"Section 2012 of the Code of 1923 gives cities the right to prescribe fire limits in any town, adopt building laws, and to employ building inspectors to see that the building laws are not violated, and to charge fees to be paid by the property owner for the said inspection.

"We would like to have your opinion as to whether the City of Anniston, Alabama, can legally require Calhoun County, Alabama, to pay for building permit, or the fee for inspection for the erection of the new county jail, which will be in the nature of an addition to the present Calhoun County Court House."

The question presented in your inquiry pertains to the legality of the collection of a building permit fee by a city in the exercise of its police power against the county, a subordinate agency of the same general source of police power, viz., the State, said building permit fee arising in connection with the erection of a county jail within the confines of the city.

In **Cook County v. Chicago,** 311, Ill. 234, 142 N. E. 512, 31 A. L. R. 442, the material issue is thus stated:

"The principal question argued in the case is whether or not the city council has power to require an observance of its fire regulations by the county in the building of a county jail. This question has never been passed upon in this state, and but few cases have been cited by counsel representing the parties to this proceeding in which the matter has been passed upon in other states. It becomes necessary therefore, to review some of the underlying principles governing the police power granted to cities and counties under the law."

The conclusion that Cook County should comply with the fire regulations of the City of Chicago in the erection of a county jail was based upon the following reasoning:

"Among the powers exercised by municipalities are what are known as the police powers of the state. These powers rest in the state, and may be delegated to municipal corporations created by the state, to be exercised for the welfare, safety, and health of the public. Under the police power cities and villages may enact reasonable ordinances to preserve health, suppress nuisances, prevent fires, regulate the use and storing of dangerous articles, control markets, and similar uses and purposes."

The conclusion is thus stated:

"When the county builds a courthouse within the limits of a city, it may be held that in so doing it acts voluntarily. No good reason, therefore, is perceived why it should not be made amenable to the reasonable police regulations imposed by the city in the interest of the general welfare.

* * * * * *

"We are of the opinion that the police power delegated to the city must be construed, as between the county and the city, as a delegation of a power to the latter which the former is expected to observe."

The reasoning and application of this same general principle of law leads to a different conclusion in the present instance, but without conflict. In the case above, the State of Illinois had failed to exercise its police power except as delegating a part of it to be exercised by the city.

Such is not the situation in Alabama, where, by statute, specific authority has been vested in the Department of Corrections and Institutions to inspect, to condemn, to require the erection of, to pass upon the arrangement of, and to order the reconditioning of, all county jails within the State and all jails within any cities of a population of 10,000 or more. Code of Alabama, 1923, Sections 4852, 4853, 4854, 4855, 4859 (as amended by General Acts, 1927, page 693), 4860; General Acts, 1939, page 118; Code of Alabama, 1940, Title 45, §§ 159, 160, 161, 162, 165, 166.

In the exercise of this general and broad power, the Department of Corrections and Institutions has, by its proper agent, passed upon and approved the building plans, specifications, and sanitary facilities and arrangements of a jail in the City of Anniston and Calhoun County. Thus, the State of Alabama has acted in the exercise of its sovereign police power, thereby making applicable the general rule of law as stated in **Board of Education v. St. Louis,** 267 Mo. 356, 84, S. W. 975, that where the state itself has dealt with the subject of the construction and the management of the property a city may not enforce its police regulations against the sovereign power of the state. This principle of law was considered in the Cook County case, for there the court stated:

"There is no delegation of police power to the counties and townships of the state, and it would seem clear, therefore, that by the delegation of the police power to cities, villages, and incorporated towns the legislature intended that the exercise of that power over the property and inhabitants within the limits of the city or village should be by that munici-

pality, subject, of course, to the right of the state — **of which it is never devested** — to exercise the police power." (Emphasis supplied)

* * * * * *

"The police power of the state has been said to be the law of overruling necessity, for the preservation of the general welfare."

It is my opinion that the City of Anniston cannot legally enforce an ordinance, levying a building inspection fee in the exercise of its police power, with respect to the erection of a jail by Calhoun County within the confines of the City of Anniston. The State, by the grant of certain police powers to the City, did not divest itself of the right to exercise its sovereign police power. The State having thus specifically exercised it, the City is powerless to enforce its ordinance.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 30, 1941.

Hon. Thos. A. Peavey,
Judge of Probate,
Escambia County,
Brewton, Alabama.

Counties — Boards of Equalization — Attorneys —

County funds cannot be expended for the employment of attorneys to represent county governing bodies or county boards of equalization (formerly boards of review) regarding tax matters before said boards of equalization, even though the taxpayer is represented by an attorney.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of May 12, 1941, in which you request an official opinion, is as follows:

"1st. Your opinion is requested this week if possible, and as soon as possible, as to whether or not the Probate Judge and Attorney representing the Court of County Commissioners, and Escambia County and its Court of County Commissioners, can employ and use and pay for Attorneys to represent THE BOARD OF REVIEW OF ESCAMBIA COUNTY, ALA.

"2nd. As shown by the Resolution hereto annexed, adopted by the Governing Body of said County.

"3rd. And in Tax Cases before the Board of Review where the Taxpayer is represented by Attorneys; We cannot find where you have made any prior ruling on the subject. Please reply with your ruling and send copy to both of us."

In reply to your request as I interpret the same, it is my opinion that county funds may not be expended for the employment of attorneys to represent county governing bodies or county boards of equalization (formerly boards of review) regarding tax matters before said boards of equalization, even though the taxpayer is represented by an attorney.

Section 5498, Subsection 8 of the Code of 1923 (Code of 1940, Title 13, Section 229, Subsection 8) confers on county governing bodies express power to retain or employ attorneys to represent the county in respect to county affairs where that duty is not expressly delegated or imposed on some other officer. **State ex rel. Sossaman v. Stone,** 235 Ala. 233, 178 So. 18; **Stone v. State ex rel. Ambrecht,** 220 Ala. 437, 125 So. 653; **Clark v. Egerton,** 207 Ala. 491, 93 So. 455.

Our Supreme Court, in the case of **State ex rel. Towle v. Stone,** 236 Ala. 82, 181 So. 281, held that the county governing body as such is charged with no duty concerning the matter of property valuation for taxation purposes which is imposed upon the board of review (now board of equalization), the other tribunal or quasi judicial body created for that specific purpose; and consequently had no power, either express or implied, to expend county funds for those purposes. The case of **Clark v. Egerton,** supra, was distinguished in said case. In view of this Supreme Court decision, it is my opinion that the county governing body cannot expend its funds for the employment of an attorney for the purposes set out in your request.

I find no authority, either express or implied, in Act No. 143, S. 18, approved March 15, 1939 (General Acts, 1939, page 178), as amended, (Code of 1940, Title 51, Sections 88-111), creating county boards of equalization in lieu of former boards of review, which authorizes said boards to employ an attorney regarding taxation matters pending before said boards. — Cf. Quarterly Report of Attorney General Volume XX, page 196.

The opinions found in Biennial Report of Attorney General, 1930-1932, page 503, and Biennial Report of Attorney General, 1932-1934, page 435, are not in conflict with the above, as said opinions deal with the employment of attorneys in tax cases that are appealed from the valuation set by boards of review (now boards of equalization) and not with matters pending before said boards. Likewise, Section 77 of the Revenue Act of 1935, which appears in the Code of 1940 as Title 51, Section 113, and referred to in the resolution as such, is not here applicable, as the same deals with representation of the State in tax appeal cases in the circuit courts.

The Code of 1940 is cited in view of the fact that said Code will become effective on May 31, 1941.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

May 30, 1941.

Hon. John D. Petree, Director,
Department of Industrial Relations,
Capitol.

Workmen's Compensation Act — Code of 1923, Section 7566, as amended (Acts 1939, pages 1036, 1038).

Where employee was injured in an accident on December 12, 1940, but his disability did not begin until after January 1, 1941, his right to compensation begins as fixed by Section 7566 of the Code of 1923, as amended (General Acts, 1939, pages 1036, 1038, Section 5).

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion under date of May 19, 1941, follows:

"Prior to January 1, 1941, Section 7566 of the Workmen's Compensation Law of Alabama was as follows:

"'7566. Waiting Period. — In case of temporary total or temporary partial disability no compensation shall be allowed for the first two weeks after disability except as provided by Section 7567, nor in any case unless the employer has actual knowledge of the injury or is notified thereof within the period specified in Section 7568. Compensation shall begin with the third week and in the event the disability from the injury exists for a period as much as four weeks compensation for the first two weeks after the injury shall be added to and payable with the first installment due the employee, after the expiration of the four weeks.'

"Effective January 1, 1941, this section was amended to read as follows:

"'7566. Waiting period. — In cases of temporary total or temporary partial disability no compensation shall be allowed for the first seven days after disability, except as provided by Section 7567, nor in any case unless the employer has actual knowledge of the inquiry or

is notified thereof within the period specified in Section 7568. Compensation shall begin with the eighth day after disability.'

"The Division of Labor of the Department of Industrial Relations, which is charged with the duty of administering the Workmen's Compensation Law of Alabama, has had a question arise which involves the interpretation and application of Section 7566.

"In the case at hand, an employee subject to the terms and conditions of the Workmen's Compensation Law then in effect was injured December 12, 1940. The employee's disability arising out of such injury did not occur until after January 1, 1941.

"The question which results from the situation as outlined in the preceding paragraph and upon which your opinion is herewith respectfully requested is, in such an instance, should the waiting period as provided for in the law as it was effective prior to January 1, 1941, or as provided for in the law effective January 1, 1941 and subsequent thereto be controlling.

"I shall appreciate your giving consideration to the question as outlined and presented herein and advising me of your opinion relative to it."

From the above it appears that the injured employee's disability began after January 1, 1941, although the accident or injury leading to disability occurred prior thereto, on December 12, 1940. It is to be inferred therefore that until actual disability began after January 1, 1941, he worked or was able to work.

Under Section 7566 of the Code of 1923, as amended by Act No. 661, H. 873, approved July 10, 1940 (General Acts, 1939, pages 1036, 1038, Section 5) compensation begins "with the eighth day after disability," and, of course, until such disability sets in or is discovered by the injured employee, he has no right to compensation nor does his cause of action therefor — so to speak — accrue.

I am of the opinion, therefore, that, under the circumstances stated in the request for this opinion, the injured employee's right to compensation should be determined according to Section 7566, supra, as amended by Act No. 661, supra, which was the effective law on and after January 1, 1941.

That would clearly be true had both the injury, or accident, and the resulting disability occurred on or after January 1, 1941. And in this instance I am of the opinion that it is immaterial that the injury or accident occurred prior to January 1, 1941, if in fact there was no disability until after that time. Any other conclusion would seem to lead to absurd results. To hold that the time of the accident, rather than the time of beginning of disability, is the focal point for determining the measure or mode of compensation for disability is not logical.

The object of the Workmen's Compensation Act is to compensate the injured employee, in some measure, for disability to work resulting from acci-

dent or injury suffered in the course of employment, irrespective of the time of such accident or injury.

See also Quarterly Report of Attorney General, Volume XII, page 125.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 4, 1941.

Hon. T. C. Garner,
Treasurer, Jefferson County,
Birmingham, Alabama.

Public Officers — Bonds — Counties — Notaries Public — Jefferson County —

1. Jefferson County held without authority of law to pay premiums on bonds and other expenses incidental to qualifying certain of its employees as notaries public.

2. Bonds of commercial notaries public should be approved by Judges of Probate after the adoption of the Code of 1940; viz, May 31, 1941.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 13, 1941, in which you request my official opinion as follows:

"Frequently Jefferson County is asked to pay premiums on Bonds and other expenses incidental to qualifying certain of its employees as Notaries Public.

"In some of the instances Jefferson County would benefit by receiving free of charge the services of such notaries, while in other cases the County might not receive any benefit.

"We have not been able to find a law or an opinion denying or setting out the legality of the question of paying expenses as outlined above, and would appreciate you giving us your opinion on the subject at your earliest convenience."

In answer to your inquiry, it is my opinion that the county is not authorized to pay premiums on bonds or other expenses incidental to qualifying certain of its employees as notaries public.

I wish to refer you to Act No. 191, H. 344, approved April 20, 1933 (General and Local Acts, 1933, page 203). Section 14 of this act provides as follows:

> "§14. The official bonds of Justices of the Peace, Notaries Public and Ex-Officio Justices of the Peace, Notaries Public, Constables and County Surveyors shall be, as to each officer, in the sum of $1,000.00 the premiums on said bonds to be paid by the person making such bond and without expense to the County."

You will note that the law is specific in its requirement that notaries public pay the premiums on their own bonds and that such bonds be made without expense to the county.

This provision of law was controlling prior to the 31st day of May, 1941, which is the day upon which the provisions of the Code of 1940 became effective. The above quoted section of the Act of 1933 appears in the Code of 1940 as Title 41, Section 94, and provides as follows:

> "§94. Justice of peace, constables, surveyors.—The official bonds of justices of the peace, constables and county surveyors shall be, as to each officer, in the sum of one thousand dollars the premiums on said bonds to be paid by the person making such bond and without expense to the county, (Ib)"

It is to be noted that no provision concerning bonds of notaries public appears in the the revised section of the Code of 1940, quoted supra.

The bond of a notary public is provided for by Title 40, Section 4 of the Code of 1940 as follows:

> "§4. Bond.—Notaries public must give bond with sureties, to be approved by the judge of probate of the county for which they are appointed, in the sum of one thousand dollars, payable to the State of Alabama, and conditioned to faithfully discharge the duties of such office, so long as they may continue therein, or discharge any of the duties thereof; which bond must be executed, approved, filed, and recorded in the office of judge of probate before they enter on the duties of such office."

You will note that the county is not expressly authorized to pay the premiums on bonds of notaries public. It is worthy of note that the above quoted provisions of law require the judge of probate of the county, rather than the county governing body, to approve the bond of the notary public. This section of the Code of 1940, therefore, reenacts the provisions of Section 9241 of the Code of 1923 which was construed to be repealed by the Act of 1933 quoted supra. — Biennial Report of Attorney General, 1934-36, page 301. Quarterly Report of Attorney General, Volume XX, page 56.

In my judgment, a notary public, as such, is not such officer or employee of the county as would permit the county governing body to set the amount of bond required and pay the premiums thereon, although the notary public be employed in some capacity by the county. Cf. Biennial Report of Attorney General, 1928-30, page 136.

Premises considered, it is my opinion that Jefferson County may not legally pay premiums on bonds and other expenses incidental to qualifying certain of its employees as notaries public.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 4, 1941.

Hon. Chas. G. Hardwick,

Tax Collector,

Morgan County,

Decatur, Alabama.

Property Subject to Taxation —

1. Real estate to which a municipality has legal title on October 1 is not subject to taxation for that tax year.

2. When such property is erroneously assessed the tax collector's duties and remedies are prescribed by Sections 178, et seq., of the General Acts of 1935, pages 431, et seq.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion bearing date of May 14, 1941, is as follows:

"The Tax Assessor has entered a real estate assessment on the 1940 Abstract in the name of Mrs. Paul Crawford, made up from information, said assessment dated March 4, 1940, and delivered to the Tax Collector with other assessments.

"The Tax Collector made his report to the Probate Court that he was unable to collect the taxes against such real estate, without a sale of the land.

"Mrs. Paul Crawford and by her attorney, filed written objections setting forth why the taxes assessed against Mrs. Paul Crawford was not delinquent and the property should not be sold. We have received notice from the Probate Judge of this action and state below the testimony as received from the Judge of Probate:

"STATE OF ALABAMA,)
: IN THE PROBATE COURT
MORGAN COUNTY.)

"This being the day and term of said Court heretofore set for delinquent taxpayers, against whose property taxes have been assessed and which are due, to appear and show cause, if any, why a decree for the sale of property assessed for taxes should not be made for the payment of taxes assessed against said property.

"There appeared before the Court in persons Mrs. Paul Crawford and by her attorney, Julian Harris, who filed written objections setting forth why the taxes assessed against Mrs. Paul Crawford was not delinquent and the property should not be sold.

"There was evidence before the Court that Mrs. Paul Crawford was not the owner of the property against which taxes were assessed on the first day of October, 1940, that on said date the same was owned by the City of Decatur under an improvement assessment sale wherein the City became the purchaser thereof on the 28th day of February, 1936, and that the City of Decatur continued to own and hold title to said property until the 27th day of February, 1941, when title thereto was conveyed to Mrs. Paul Crawford.

"Therefore upon consideration of the testimony the Court is of the opinion that the objections filed on this day are well taken, and that said property was not subject to taxation for said assessment and the taxes based thereon is void.

"Given under my hand and Seal this the 12 day of May, 1941.

"T. C. Almon

JUDGE OF PROBATE

"Please advise us what action should be taken by the Tax Collector, as the first publication of delinquent taxes will be June 9th, the second June 16th and the third June 23rd, and the sale of taxes July 14th."

It appears from your letter that this property inquired about was the property of the City of Decatur, to which they had legal title on October 1, 1940. This being true, the property was not subject to taxation on October 1, 1940.

Constitution of Alabama, Article 4, Section 91; Act No. 194, H. 324 (General Acts, 1935, page 256, Section 2);

Quarterly Report of Attorney General, Vol. XXII, page 226.

Mrs. Crawford appears to have acquired the property by deed in February, 1941. The property not being subject to taxation at the beginning of the tax year, October 1, 1940, the same cannot be assessed against Mrs. Crawford.

The course for you to pursue is pointed out in Sections 178, et seq., of the Revenue Code of 1935 (General Acts, 1935, pages 341, et seq.), the same act of the Legislature above referred to.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 5, 1941.

Hon. Chris J. Sherlock, Director,
State Highway Department,
Montgomery, Alabama.

Proceeds of sale of the toll keeper's house situated at the John H. Bankhead Bridge (Bridge No. 4) go to the General Fund of the State of Alabama.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion bearing date of April 24, 1941, is as follows:

"Re: Disposition of Proceeds from Sale of Toll Keepers' Houses and Lots on Freed Bridges.

"On March 23, 1939, you advised this office by official opinion that this Department was authorized to sell the Toll Keeper's house and lot situated at Riverside Bridge. However, no mention was made as to the disposition of the proceeds realized from the sale of this property.

"In the past year several of these toll keepers' houses have been rented, and others have been sold, but this Department has not been credited with the proceeds of such rental receipts and funds derived from the sale of those houses which were sold.

"The Riverside Bridge is known officially as the John H. Bankhead Bridge, being bridge No. 4 of the fifteen toll bridges that were freed by a lease arrangement with the State Highway Department by authority of an Act of the Legislature. The funds that were and are used for the annual payment on this lease are State Highway Department funds.

"Therefore, please advise as to whether or not you consider this Department legally entitled to the rental returns and proceeds from the sale of any of the toll keepers' houses and lots on the fifteen bridges."

It is my opinion that the proceeds of the sale or lease of a toll keeper's house at the John H. Bankhead Bridge (Bridge No. 4) go to the General Fund of the State of Alabama.

In an opinion of this office to Hon. Chris J. Sherlock, State Highway Director, under date of March 23, 1939 (Quarterly Report of Attorney General, Vol. XIV, page 227), it was held that the toll keeper's house situated at the John H. Bankhead Bridge was not included within the mortgage held by the First National Bank of Montgomery, as trustee for the bond holders, on the various toll bridges, and therefore that this toll keeper's house could be sold as any other real property owned by the State of Alabama.

The title to the John H. Bankhead Bridge and fourteen other toll bridges was originally vested in the Alabama State Bridge Corporation, subject to a mortgage to the First National Bank of Montgomery, as trustee for the bond holders. However, on April 8, 1937, all fifteen of these bridges "together with and also all appurtenances thereto, all tools, machinery, appliances, equipment, office fixtures, and furniture, and all other property owned by lessor (Alabama State Bridge Corporation)" was conveyed to the State of Alabama, subject to the mortgage of the First National Bank of Montgomery, as trustee. Although the word "lessor" is used in one place in the conveyance, the instrument is unquestionably a deed, rather than a lease. There was no attempt in this deed to earmark any funds that might be received from the sale or lease of any of this property to the Alabama State Bridge Corporation or the State Highway Department.

The opinion of this office to Hon. Chris J. Sherlock, supra, held that the toll keeper's house in question was not subject to the mortgage held by the First National Bank, as trustee. Therefore, as to that toll keeper's house and similarly situated toll keepers' houses the title to same was in the State of Alabama unincumbered by any mortgage. Funds derived from the sale or lease of such toll keepers' houses have not been earmarked by any act of the Legislature.

Therefore, in view of the fact that the toll keeper's house situated at the John H. Bankhead Bridge was vested in fee simple in the State of Alabama, clear of all incumbrances, the proceeds from the sale or lease of such house and houses in a similar situation would go to the General Fund of the State of Alabama.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 6, 1941.

Dr. J. S. Ganey, Superintendent,
Alabama Institute for Deaf and Blind,
Talladega, Alabama.

Schools — Teachers — Alabama Institute for Deaf and Blind —

A teacher who has completed his contract of service of thirty-six weeks is entitled to compensation for twelve months in accordance with the contract of employment, although he may be employed in another capacity before the expiration of said twelve months.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of May 29, 1941, in which you request an official opinion, is as follows:

"Will you please give me your opinion in the following case?

"At the regular Board meeting of the Trustees of the Alabama Institute for Deaf and Blind held in May, 1940 Mr. John W. Haynes was re-elected to teach in the Academic Department of the School for the Deaf for the session 1940-41 at a salary of $1,380. Mr. Haynes' term began September 1, 1940 and for the convenience of the School, whose appropriations come into the school treasury quarterly, Mr. Haynes' salary, it was understood, would be paid in twelve monthly installments. However, his term of service would be only for the actual scholastic term of thirty-six weeks of teaching which school term actually began September 11, 1940 and closed May 23, 1941.

"At the regular Board meeting of this same Institution held in May, 1941 Mr. Haynes was elected as Field Agent for the Institution and his term of service in that new capacity is to begin July 1, 1941 with a salary of $1,600. At that time, namely, July 1, 1941 Mr. Haynes will have received only $1,150 of the $1,380 due him for the teaching service which he has just recently completed on May 23rd of this year. In other words, the two monthly salaries of $115 each for the months of July and August, 1941 will not have been paid.

"At a meeting of the Executive Committee of the Board of Trustees of this Institution held May 28, 1941, it was the opinion of the members of that Committee that Mr. Haynes has completed the service for which he was elected as teacher of the Institution for the session 1940-41 and is, therefore, entitled to the full payment of $1,380 for that service. However, his new term of office for the position of Field Agent begins July 1, 1941 and he will, therefore, draw a salary for that position beginning July 1, 1941, and the question now arises can we legally pay Mr. Haynes the two deferred payments for July and August and also pay him his salary beginning July 1 for his services as Field Agent."

I am of the opinion that your inquiry should be answered in the affirmative.

The management and control of the Alabama Institute for Deaf and Blind is vested in its Board of Trustees. Said Board has the authority to employ its officers and teachers and to fix the amount of compensation and the time of the payment thereof. (Sections 578 and 581, School Code of Alabama, 1927; Code of 1940, Title 52, Sections 520 and 523.) See Biennial Report of Attorney General, 1928-1930, page 959.

Mr. Haynes' employment as a teacher was actually for a period of service of only thirty-six weeks, although, for convenience, his compensation was payable in equal monthly installments for twelve months. When he had completed his period of service, he had fulfilled his service contract and would be entitled to full compensation over the twelve-months period. — Quarterly Report of Attorney General, Volume XV, page 256; Cf. Quarterly Report of Attorney General, Volume XIII, page 133.

The fact that Mr. Haynes is employed in another capacity after the period of his service contract has been completed, but before the expiration of the twelve-months period over which he was to receive his compensation, would not, in my judgment, affect the above conclusion. Neither position held by Mr. Haynes is an office of profit within the meaning of any constitutional or statutory inhibitions as to holding two offices of profit at one and the same time. Each position is, in my opinion, merely an employment.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 6, 1941.

Hon. Edward B. Crosland,
Chief, Division of Local Finance,
Capitol.

Act No. 186, S. 129, approved March 15, 1939, General Acts, 1939, page 344, brought forward as Sections 216-235, inclusive, of the Code of Alabama, 1940, Title 52.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion, under date of June 2, 1941, is as follows:

"Several county boards of education have authorized the issuance of school warrants recently pursuant to the provisions of Act No. 186, S. 129, approved March 15, 1939, General Acts of Alabama, 1939, page 344. Said school warrants are to be dated June 1, 1941.

"In order that the rendering of the opinion of the bond attorneys as to the validity of said warrants can be expedited, it is necessary that they receive your opinion to the effect that said Act No. 186 supra, has been incorporated in its entirety or verbatim in the Code of Alabama, 1940. Therefore, I respectfully request that you give me an official opinion in regard to the above at your earliest convenience."

In reply to the above request, I beg to advise that I have carefully checked Act No. 186, S. 129, approved March 15, 1939 (General Acts, 1939, page 334), and find that, with the following exceptions, this act is carried forward in the Code of Alabama, 1940, as Title 52, §§216-235, inclusive. The only differences which I find in the act as carried forward in the 1940 Code and the act as it originally appeared in the Acts of 1939 are as follows:

1. In Section 1 of the original act, subsection 3 thereof is omitted from Section 216 of the 1940 Code.

2. Wherever the words "funding" and "or funding" appear in the original act, such words are omitted from the act as it appears in the 1940 Code.

3. In line 16, page 336, of the original act, the word "hereafter" as it appears in the original act reads "heretofore" in the 1940 Code.

4. In line 17, page 336, after the words "April 16, 1936," the provision "pursuant to the proviso of Section 25 hereof" is omitted from the 1940 Code.

5. Sections 21 and 22 of the original act were not carried forward in the 1940 Code.

6. Section 23 of the original act was carried forward in the 1940 Code in the following language:

"All elections in school districts or counties which prior to June 25, 1940, have been held for the purpose of authorizing a special tax for any school purpose or for school purposes generally under the Constitution, which said election resulted in a majority of the votes cast being in favor of the said tax and which said elections were irregular by reason of failure prior to the actual holding of the election to give notice thereof in a newspaper or by reason of any other irregularity, be and the same are hereby ratified and confirmed and given effect in all respects as if all provisions of law relating to such election had been duly and legally complied with and the said tax may be levied and collected accordingly."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 10, 1941.

Hon. Vernol R. Jansen, Attorney,
Board of Revenue and Road Commissioners,
301 Masonic Temple Building,
Mobile, Alabama.

Board of Revenue and Road Commissioners of Mobile County may not legally expend county funds for the purpose of (a) erecting and maintaining a cattle stockade, (b) employing additional men to pick up stray cattle, or (c) paying a reward for the apprehension and conviction of persons guilty of cutting fences.

Opinion by the Attorney General.

Dear Sir:

I have your letter of March 25, 1941, in which you request my opinion as follows:

"Acting in accordance with a resolution adopted today by the Board of Revenue and Road Commissioners of Mobile County, I am submitting for your opinion the following questions:

"1. May the Board of Revenue and Road Commissioners of Mobile County legally appropriate money for the construction and operation of a cattle stockade or pound?

"2. May the Board of Revenue and Road Commissioners of Mobile County, Alabama, employ and pay salaries or wages to persons picking up and transporting livestock principally cattle, wilfully permitted to run at large by the owners of the livestock and cattle? To clarify this question, these persons would be additional employees and would not include those persons and officers described in the Enabling Act of the Local Acts of 1940 placing our sheriff on a salary and providing for his deputies and assistants.

"3. May the Board of Revenue and Road Commissioners lawfully offer or pay rewards for the apprehension and conviction of persons maliciously destroying fences on the property of another? I found no general authority for Mobile County to employ and pay out of the general fund any motor equipment operators, and the only authority for the purchase and operation of a truck to transport stock would, in my opinion, be the provision under the Enabling Act referred to authorizing the Board to furnish the sheriff with necessary supplies and equipment.

"I have found no legislative authority for the payment of rewards by County governing bodies except for arresting escaped convicts.

"I know of no authority for the County governing body of this County to operate a stockade for the confinement of stray stock and no authority for the payment of pound keepers for their services. The state-wide stock

law adopted at the last session of the Legislature prohibits stock from running at large, but it confers on the County governing body no authority to establish the facilities for enforcement."

It must be taken as settled in this state that counties, being governmental agencies of the state, can be made chargeable with and liable for only such claims and obligations as the law imposes on them or authorizes or empowers them to contract for. This power may be derived either from an express authorization of the law or by necessary implication.

I have carefully examined the local laws defining the power and authority of the Board of Revenue of Mobile County and I am unable to find any provision which expressly authorizes the expenditure of county funds for any of the purposes mentioned in your request for opinion.

There is no such express authorization in any of the statutes of the State of Alabama relating to the impounding of stock found running at large.

In order to answer your inquiries, therefore, it is necessary to consider the question as to whether or not the county governing body of Mobile County has the implied power to make such expenditures.

It is true that Section 80, Title 3, Code of Alabama, 1940, authorizes "the sheriff and his deputies of any county" to "take possession of any livestock or animal found at large upon the public lands, roads, highways or streets in the State of Alabama." and that Section 87 of Title 3, supra, provides:

"In counties or municipalities where livestock or animal pounds are maintained, any person or officer seizing any livestock or animal may transfer such livestock or animal so seized to the pound keeper for safekeeping and the county or municipality shall be refunded any amounts which may be expended for keeping and feeding any livestock or animal, as provided in this chapter."

I do not believe, however, that these provisions of the statute can be taken as conferring on the county governing bodies of the state the authority to construct pounds or stockades to be used for the purpose of impounding stray cattle or to employ additional law enforcement officers for the purpose of apprehending such stray cattle.

The courts of this state have been very reluctant to increase the powers of the governing bodies of the several counties of the state by implication.

In the case of **Van Epps v. Commissioners' Court,** 25 Ala. 460, the Supreme Court of this state held that Mobile County was without authority of law to pay for the hire of carriages used to convey the grand jurors to the county jail for the purpose of inspecting it. The Court held:

"A county can be charged only with such expenses as are authorized by law and unless there is some statute which authorizes the judge of the circuit court to direct the sheriff to provide carriages to convey the grand

jurors to the jail, for the purpose of inspecting it, the expense thus incurred cannot be recovered out of the county."

In the case of **Mitchell v. Tallapoosa County,** 30 Ala. 130, the Supreme Court of the state held that a county was without authority to provide medical attention, drugs or medicine to prisoners confined in jail. The Court said:

"It is argued that the county ought by all means to be held liable for the medical services rendered to the slave Rich, who was confined upon the charge of murder of his master, because the services were necessary to his life and health and because the relations of his late master refused to procure medical aid for him. It is a sufficient answer to that argument to say that there is no law which authorizes a liability against the county out of the facts as stated."

In the case of **Posey v. Mobile County,** 50 Ala. 86, the Supreme Court of Alabama held that an attorney who had been appointed to represent a defendant in a capital case could not be paid by Mobile County for the services which he had performed, even though the statutes of this state required that counsel be appointed in capital cases and that the lawyer performed the services under the appointment of the Court. The Court said:

"The statute which directs that, if the accused 'is unable to employ counsel, the Court must appoint counsel for him, not exceeding two, who must be allowed access to him at all reasonable hours' makes no provision for the payment of counsel fees. And upon the principle that whatever is omitted in a law, is not intended, I feel bound to come to the conclusion that the State does not in any way assume a liability to pay fees for such services."

In the case of **Naftel v. Montgomery County,** 127 Ala. 563, 29 So. 29, it was held that a doctor who performed an autopsy at the request of county officials was not entitled to receive a fee of $50 from Montgomery County, even though he was requested to perform the services in accordance with the provisions of a statute which authorizes the summoning of a physician to make a post mortem examination when the cause of the death of a person is undetermined.

In the case of **Walker v. Bridgeforth,** 9 Ala. App. 257, 62 So. 323, it was held that Limestone County could not legally pay a practising attorney of that county who had been engaged by the County Commissioners to prosecute or assist the solicitor in prosecuting a criminal case against a defendant charged with violation of the provisions of a local road law for the county. The Court held that even though the county governing body had the authority to employ attorneys for certain purposes, such power did not extend to employment of attorneys to assist in the prosecution of the criminal laws of the state, this duty being imposed by statute on the solicitors and the Attorney General.

One of the leading cases on this subject is the case of **Mobile County v. Drago,** 172 Ala. 155, 54 So. 995, wherein the Court laid down the following rule:

"The law of this state (however it may be in other jurisdictions) is long and well settled that counties are governmental agencies of the State and that they are, therefore, chargeable with and liable for those claims or demands — and those only — which the law imposes upon them or empowers them to contract for."

In the comparatively recent case of **State ex rel. Towle v. Stone, County Treasurer,** 236 Ala. 82, 181 So. 281, which was appealed to the Supreme Court from Mobile County, the Supreme Court again refused to extend the powers of the governing body of Mobile County by implication. The Board of Revenue and Road Commissioners of Mobile County seems to have employed Mr. Towle to perform services for the county before Board of Review in relation to appraisal of taxable property. Said Board issued a county warrant in payment for the services rendered by Mr. Towle. Registration of the warrant was denied and a mandamus proceeding was instituted against the county treasurer, Mr. Stone, to require him to register the warrant for payment. In concluding that the county was without authority to so employ Mr. Towle, the Court said in part as follows:

"Here it is clear enough the Board of Revenue, as such, is charged with no duty concerning the matter of property valuation for taxation purposes, which was imposed upon the Board of Review, the other tribunal and a quasi judicial body created for that specific purpose. And it is not pretended the Board of Review made any such employment or had authority to do so.

"And as to the Board of Revenue, it is not pretended that it possessed any expressed authority to make such a contract. But the insistence is that the power is **necessarily implied** and much argument is made as to the necessity for revenue, 'the life blood of government,' and the duty of the county to protect its revenue at its source.

"The argument is plausible, but, in our opinion, is not supported by the cited authorities, and is not in harmony with the above quoted established rule in the state.

* * * *

"The matter of adjustment of tax valuation rested with the Board of Review. Neither the county nor its Board of Revenue were delegated any duty or authority in relation thereto. Incidentally, of course, the county had an interest. But there was no duty imposed concerning this adjustment. However, we forego further discussion.

"There being no duty imposed or authority conferred in relation to the work before the Board of Review, no implied power can follow and the trial court correctly so ruled." (Emphasis supplied)

There is no duty imposed upon the counties of this state, as such, to enforce the criminal laws of the state. The duty of enforcing the stock laws rests upon those officials who are charged by law with the enforcement of all the criminal laws of this state.

I do not believe that it can be successfully maintained that Section 87 of Title 3 of the Code of Alabama, 1940, indicates a legislative intent that the counties of the State of Alabama wherein the stock laws are in force and effect may legally expend the funds of the county for the purpose of constructing a "pound or stockade." There is no question but what municipalities have the authority to construct and maintain pounds. The authority is specifically given to them by statute.

Section 81 of Title 3, Code of Alabama, 1940, is as follows:

"§81. Owners may secure stock taken up upon payment of fees. — The owner of the livestock or animal shall have the right to secure such livestock or animal upon the payment of a fee of one dollar for each head of livestock or animal taken up to the officer taking up such livestock or animal upon the public lands, highways, streets or roads in the State of Alabama, together with such damages, if any, as may have been suffered by any person, and together also with the actual cost of feeding such animal during the period held by such officer if there have been no proceedings in court. Upon such payment being made the fee of one dollar for taking up the animal shall be paid to the officer making the seizure, and the amount collected as damages and the actual cost of feeding the animal shall be paid over to the person damaged and to the person at whose expense such animal was fed during the period of retention. Provided, however, that for any seizure, if more than one animal is taken up, an additional fee of fifty cents shall be paid for each additional head of livestock or animal so taken up, but no fee shall be paid over and above five dollars, notwithstanding the number of animals so taken up."

It is my opinion that the Legislature intended that the person taking up the stock, whether officer or individual, should find a place for it to be kept pending the return of the animal to its rightful owner. This procedure is not unusual. The sheriffs of the several counties of this state are, from time to time, required to levy on stock and are required to find a place for its safekeeping pending its release by them.

In view of the above, it is my opinion that the Board of Revenue and Road Commissioners of Mobile County may not legally appropriate money for the construction and operation of a cattle stockade or pound.

It is further my opinion that the Board of Revenue and Road Commissioners of Mobile County may not employ and pay salaries or wages to persons picking up and transporting livestock which has wilfully been permitted to run at large by the owners thereof. There is a fee prescribed for this service by Section 81, supra.

I am also of the opinion that the Board of Revenue and Road Commissioners of Mobile County may not legally pay rewards for the apprehension and conviction of persons maliciously destroying fences on the property of another. Quarterly Report of Attorney General, Volume XVI, page 198.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 13, 1941.

Hon. R. K. Greene,
Judge of Probate,
Hale County,
Greensboro, Alabama.

Elections — Registration — Notice of —

1. Notice of meetings of Board of Registrars for the purpose of registering voters should be given when the time of the meetings is not definitely fixed by law.

2. No notice of meetings of Board of Registrars for the purpose of registering voters should be given when the time of the meetings is definitely fixed by law.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of May 30, 1941, is as follows:

"A recent examination of the Commissioners Court of Hale County, charges back to the Commissioners items for publishing notice of meeting of registrars for the year 1940. I have written Mr. Singleton on the matter and Mr. Singleton knows of no provision whereby notice of meetings can be paid by either the State or County on the even years.

"It is obvious that a meeting without notification would be entirely without reason and I am requesting a ruling from you on the matter."

I assume from your letter of inquiry that you have reference to meetings of the Board of Registrars for the purpose of registering voters.

Meetings of the Board of Registrars for the purpose of registering voters were governed by the provisions of Sections 375 and 376 of the Code of Alabama, 1923.

Section 375, supra, was amended by Act No. 289, S. 179, approved August 20, 1927 (General Acts, 1927, p. 274).

Section 376, supra, was first amended by Act No. 289, supra, next by Act No. 56, H. 278, approved October 4, 1932 (General Acts, 1932, p. 67), then by Act No. 532, H. 976, approved September 14, 1935 (General Acts, 1935, p. 1120), and finally by Act No. 155, H. 171, approved April 21, 1936 (General Acts, 1936, p. 174).

Section 375, as amended, supra, and Section 376, as last amended, supra, were the applicable statutory provisions in regard to meetings of the Board

of Registrars for the purpose of registering voters in the year 1940. They read, respectively, as pertinent, as follows:

"375. (305) (1563, 1572) BOARD OF REGISTRARS TO HOLD FIXED MEETING AND GIVE NOTICE THEREOF. **The board of registrars in each county shall visit each precinct at least once and oftener if necessary between October first and December thirty-first, 1927, and each two years thereafter, to make a complete registration of all persons entitled to register, and shall remain there at least one half a day. They shall give at least twenty days' notice of the time when, and the place in the precinct where they will attend to register applicants for registration by bills posted at three or more public places in each election precinct, and by advertisement once a week for three successive weeks in a newspaper, if there be one published in the county.** Upon failure to give such notice or to attend any appointment made by them in any precinct, they shall, after like notice, fill new appointments therein. The time consumed by the board in completing such registration shall not exceed thirty working days in any county, *** . **The board of registration in each county shall meet at the court house on the fourth Monday in January, 1928, and each two years thereafter and shall remain in session ten working days for the registration of voters."** (Emphasis supplied)

"376. SPECIAL REGISTRATION. In addition to the regular registration provided in this article, **the courts of county commissioners, boards of revenue, county commissioners, or other courts of like jurisdiction of the several counties may make an order requiring the books of registration to be opened for ten working days during the month of January, 1921, and each two years thereafter, and it shall be mandatory for the board of registrars to meet on the first Monday in July, 1936, and each two years thereafter, and remain in session at each of said meetings five days for the purpose of registering voters, and the board shall meet on the first Monday in July, 1937, and each two years thereafter and shall remain in session at each of said meetings for five days for the purpose of registering persons entitled to register,** *** " (Emphasis supplied)

From the above it can be seen that the time of meetings of the Board of Registrars for the purpose of registering voters in January of the even numbered years is definitely fixed by law at a period of ten working days beginning on the fourth Monday in January; and that the time of meetings of the Board of Registrars for the purpose of registering voters in July of each year is definitely fixed by law at a period of five days beginning on the first Monday in July.

On the other hand, the time of meetings of the Board of Registrars for the purpose of registering voters between October 1 and December 31 of the odd numbered years is not definitely fixed by law, the time of the meetings being left to the discretion of the Board of Registrars, subject only to the limitations that said meetings must be between October 1 and December 31 and that the time consumed shall not exceed thirty working days. Likewise, the time of the meetings of the Board of Registrars for the purpose of registering voters which the county governing body is authorized to require in January of the odd numbered years is not definitely fixed by law, the time of the meetings being left to the discretion of the county governing body, subject only to

the limitations that they be for ten working days during the month of January.

It is also to be noted that the only specific proviso as to notice of meetings of the Board of Registrars for the purpose of registering voters is the proviso in Section 375, as amended, supra, in regard to the meetings to be held between October 1 and December 31 of the odd numbered years.

However, this office, in opinions to Hon. W. A. Webb, Chairman Board of Registrars, Macon County, Tuskegee, Alabama, under date of January 3, 1934, Biennial Report of Attorney General, 1932-34, p. 452; and to Hon. James H. Hard, Jr., State Comptroller, Capitol, under date of March 2, 1934, Biennial Report of Attorney General, 1932-34, page 515, in considering this question under Section 375, as amended, supra, and Section 376, as amended by Act No. 56, supra, held that the two sections should be construed together, and concluded:

1. Notice of all meetings of the Board of Registrars for the purpose of registering voters, when the time of the meetings is not definitely fixed by law, should be given as provided in Section 375, as amended, supra.

2. No notice of meetings of the Board of Registrars, for the purpose of registering voters, when the time of the meetings is definitely fixed by law, should be given.

While the dates of certain meetings of the Board of Registrars for the purpose of registering voters are not the same under the statutory provisions that were applicable in the year 1940 as they were under the statutory provisions considered in those opinions, the conclusions there reached are equally applicable. Consequently, it is my opinion that, as to meetings of the Board of Registrars for the purpose of registering voters held between October 1 and December 31 of the odd numbered years, and in the month of January of the odd numbered years, if authorized by the county governing body, notice should be given as provided in Section 375, as amended, supra. However, as to meetings of the Board of Registrars for the purpose of registering voters beginning on the fourth Monday in January of the even numbered years and on the first Monday in July of each year, no notice should be given.

The reason for such a holding in obvious. As to meetings of the Board of Registrars for the purpose of registering voters where the time of the meetings is not definitely fixed by law, it is necessary that notice of such meetings be given in order to apprise the people of such meetings; whereas, as to meetings of the Board of Registrars for the purpose of registering voters where the time in definitely fixed by law, no notice is necessary in order that the people may know the time of such meetings.

From what has been said hereinabove, it can be seen that it is my opinion that no notice of the meetings of the Board of Registrars for the purpose of registering voters during the year 1940 should have been given. This being true, I know of no authority of law for the payment of the costs of such notices by either the state or county.

In this connection, your attention is called to Section 386 of the Code of Alabama, 1923, which provides that the costs of the publication of notices required to be given by the Boards of Registrars shall be paid by the state. See opinion to Hon. W. H. Price, Chairman, Board of Registrars, Madison County, Huntsville, Alabama, under date of October 18, 1935, Quarterly Report of Attorney General, Vol. I, p. 91.

In the above opinion, no consideration has been given to special statutory provisions in regard to meetings of the Board of Registrars applicable to the counties of Jefferson, Mobile and Montgomery.

Section 375, as amended, supra, and Section 376, as last amended, supra, and Section 386, supra, are codified, respectively, in the Code of 1940, as Sections 26, 27 and 37 of Title 17, without change in legal effect, so far as the questions here under consideration are concerned, except that under Section 37, supra, the bills for the costs of publication of notices are to be rendered to the Director of Finance and approved by him, whereas, under Section 386, supra, they were rendered to the Secretary of State and approved by him. Subject to this qualification, what has been said hereinabove as to these matters, under the statutory provisions applicable thereto during the year 1940, is equally true under the statutory provisions in regard thereto appearing in the Code of 1940, cited supra, which became effective on May 31, 1941.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 13, 1941.

Hon. Hunter Phillips,
Judge of Probate,
Choctaw County,
Butler, Alabama.

Counties — County Governing Body — Rights-of-way — Eminent Domain —

County governing body has authority to agree on price to be paid for right-of-way, even after condemnation proceedings have been instituted.

Opinion by the Attorney General.

Dear Sir:

Your request for official opinion, under date of May 9, 1941, is as follows:

"I will appreciate an opinion at your earliest convenience on the following matter.

"In getting right-of-ways we have had to condemn certain property and after the appraisers have fixed a valuation or a price to be paid the property owner and same has been recorded in the Probate Minutes the property owner comes in and states that he will settle for a certain price, which is usually in excess of the amount offered by the appraiser. Is it permissable for the Commissioners Court to reopen the case and allow the amount agreed upon. In other words, does the Commissioners Court have the authority to review these cases or the cases that come before them in such matters and adjust same by increasing the appraisers valuation and settle the cases without any further procedure."

It is my opinion that the Commissioners' Court has the authority to agree with the land owner on the price to be paid for the lands needed for the rights-of-way, irrespective of the fact that condemnation proceedings have been instituted in the probate court because of the inability of the Commissioners' Court and the land owner to originally agree on the price to be paid for the lands.

Sections 25 and 44 of Title 23 of the 1940 Code relate to the duties and powers of the governing bodies of the several counties of the state to acquire rights-of-way for the establishment of pubilc roads, bridges and ferries.

Section 43 of Title 23 of the 1940 Code is as follows:

"§ 43. Powers of courts of county commissioners with regards to roads, bridges and ferries. — The courts of county commissioners, boards of revenue, or other like governing bodies of the several counties of this state have general superintendence of the public roads, bridges and ferries within their respective counties so as to render travel over the same as safe and convenient as practicable. To this end they have legislative, judicial, and executive powers, except as limited in this chapter. Courts of county commissioners, boards of revenue, or courts of like jurisdiction are courts of unlimited jurisdiction and powers as to the construction, maintenance and improvement of the public roads, bridges and ferries in their respective counties, except as their jurisdiction or powers may be limited by the local or special statutes of the state. They may establish, promulgate and enforce rules and regulations, make and enter into such contracts as may be necessary, or as may be deemed necessary or advisable by such courts, or boards, to build, construct, make, improve and maintain a good system of public roads, bridges and ferries in their respective counties, and regulate the use thereof; but no contract for the construction or repair of any public roads, bridge or bridges shall be made where the payment of the contract price for such work shall extend over a period of more than ten years."

The county governing body originally had the power and authority to agree with the land owner as to the amount to which he was entitled for the lands which he was to relinquish to the county or state, and I do not believe that it has lost the authority to agree with the land owner merely because of the fact that condemnation proceedings were instituted.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 16, 1941.

Hon. John T. Frazer,
Judge of Probate,
Lee County,
Opelika, Alabama.

Code, 1940, Title 51, §619(d) — Filing Tax — Mortgages —

Mortgage given to secure a debt, already secured by a prior mortgage, and a new presently incurred debt also, is subject only to the mortgage filing tax measured by the amount of new debt, provided the filing tax was paid on the prior mortgage, and the amount and maturity of the original debt remains unchanged.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated June 11, 1941, follows:

"In accordance with our phone conversation this morning, I am enclosing an excerpt from the mortgage of Morrison to Fuller E. Callaway Foundation.

"I will appreciate it if you will please advise me whether mortgage tax should be collected only on the increased loan of $15,000.00, or on $26,250.00, which is the combined amount of both mortgages."

From the foregoing and the paper therein referred to as "an excerpt", it appears that the mortgagors executed a mortgage securing $11,250 payable in installments on October 1 of each of the years 1942 to 1945 inclusive, and thereafter executed another mortgage securing a debt of $15,000 payable $3,000 on October 1 of each of the years 1943 to 1947 inclusive, and that the latter mortgage conveys the property included in the first mortgage and in addition thereto other property.

You do not state whether the mortgage filing tax has been paid on the first mortgage. Assuming that it was paid, however, it is clear that as to the original mortgage debt of $11,250 the subsequent mortgage operates only as additional security. Neither the amount nor the maturity of the first mortgage has been changed. I am of the opinion, therefore, that as to the mortgage last executed, the mortgage filing tax should be computed only on the $15,000 of new debt. See also Quarterly Report, Attorney General, Vol. XIX, page 181; Code, 1940, Title 51, §619(d).

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 17, 1941.

Hon. Albert W. Gill, Director,
Division of Forestry,
Department of Conservation,
Montgomery, Alabama.

Adverse Possession — Limitation of Actions — Swamp and Overflow Lands — State —

Title may be acquired to swamp and overflow lands as against the State by adverse possession provided such adverse possession was for a period of twenty years or more prior to May 1, 1908, and provided that patent to the particular land involved had been issued to the State by the Federal Government prior to May 1, 1888.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of June 11, 1941, in which you request my opinion as follows:

"We have received many inquiries throughout the State involving title to Swamp and Overflowed lands. These lands were conveyed at divers times by the Federal Government to the State of Alabama and subsequently by the State to the Alabama Insane Hospital. On September 22, 1939 the Governor approved an act of the legislature placing the supervision of these lands in the Department of Conservation. It is our understanding that private individuals have been assessing some of this land for many years and are claiming it through the theory of adverse possession.

"I should like to have your official opinion advising me if adverse possession applies to S. & O. lands and whether or not a private individual may acquire title to S. & O. lands by assuming possession of it adversely."

In answer to your inquiry, it is my opinion that title may be acquired to swamp and overflow lands as against the State (or the Alabama Insane Hospitals) by adverse possession, provided such adverse possession was for a period of twenty year or more prior to May 1, 1908, and provided that a patent to the particular land involved had been issued to the State by the Federal Government prior to May 1, 1888.

Swamp and overflow lands were granted to the several states under an Act of Congress approved september 28, 1850, (9 U. S. Statutes 519). Said lands were to be selected in accordance with the terms of the Act of Congress. The states were given a fee simple title, subject to disposal by the respective legislatures thereof, with the proviso that the proceeds of said lands, whether by sale or a direct appropriation in kind, shall be applied, exclusively, so far as necessary, to the purpose of reclaiming said lands by means of levees and drains as provided in said act.

In the case of **Henry v. Brannan,** 149 Ala. 323, 42 So. 995, it was held that the State was without authority to issue a patent to swamp and overflow lands until such lands had been patented by the Federal Government to the State, or certified by authority of the State as belonging to it. A documentary title from the Federal Government is necessary to vest title in the State.

The history of swamp and overflow lands is discussed in detail in the case of **Jordan v. McClure Lumber Co.,** 170 Ala. 289, 54 So. 415, and the validity of an act authorizing a disposal thereof by the State was upheld. See, also, **Southern Railway Co. v. Cleveland,** 169 Ala. 22, 53 So. 767; **Brannan v. Henry,** 175 Ala. 454, 57 So. 967; **Turner v. Davis,** 186 Ala. 77, 64 So. 958; **State v. Mobile O. R. Co.,** 190 Ala. 409, 67 So. 286; Ib. 201 Ala. 271, 78 So. 47. However, none of the above cited cases, or any other cases I have been able to find, pass directly upon the matter of your inquiry.

The case of **State v. Inman,** 239 Ala. 348, 195 So. 448, held that a suit in ejection by the State to recover possession of internal improvement lands, granted to it by the United States, but held adversely by the defendant and his predecessors in title under a claim of ownership in fee simple for over twenty years of period during which the State was subject to statute of limitations governing actions to recover realty, was barred by such statutes. As noted in said opinion, the State was made subject to the statute of limitations of twenty years in actions for the recovery of real property by Section 2475 of the Code of 1852. This situation continued (insofar as the instant inquiry is concerned) until the day of the adoption of the Code of 1907, i. e., May 1, 1908, wherein by Section 4830 of said Code it was provided that there is no limitation of time within which the State may bring actions for the recovery of lands, etc. Said Section 4830, supra, was carried forward in the Code of 1923 as Section 8939 and in the Code of 1940 as Title 7, Section 16. Therefore, it will be seen that the twenty-year period above referred to must have occurred after the adoption of the Code of 1852 and before May 1, 1908, the date of the adoption of the Code of 1907. The Inman case, in my judgment, is analogous to the situation presented in your inquiry and the rule of law therein enunciated, in my opinion, controls the answer to said inquiry.

The fact that the act of Congress approved September 28, 1850, supra, contained the proviso that the proceeds of the sale of swamp and overflow lands, whether by sale or a direct appropriation in kind, should be applied, exclusively, as far as necessary, to the purpose of reclaiming said lands by means of levees and drains in accordance with said act does not, in my judgment, prevent the statute of limitations from running against the State for the recovery of said lands. As above pointed out, the State acquired a fee simple title subject to disposal of the Legislature. Regardless of the proviso, the title to the property was vested in the State and was subject to adverse possession, provided said adverse possession occurred during the period in which the State was subject to the statute of limitations governing actions for recovery of lands. See **State v. Inman,** supra; **State v. Schmidt,** 232 U. S. 168, 34 S. Ct. 301, 58 L. Ed. 555.

It does not appear from your inquiry as to when the State acquired title to the swamp and overflow lands under consideration. If said lands were not acquired until after May 1, 1888 in accordance with the decision in the case of **Henry v. Brannan,** supra, there could be no adverse possession against the

State for the twenty-year period prior to May 1, 1908. Adverse possession will not run against the United States Government and any adverse possession by any individual prior to the time the title became vested in the State could not be counted in the twenty-year period. 2 **Corpus Juris 213; Redfred v. Parks,** 132 U. S. 239, 10 S. Ct. 83, 33 L. Ed. 327; **Swift v. Doe,** 162 Ala. 147, 50 So. 123.

If the twenty-year period of adverse possession was not completed before May 1, 1908, the State would not be precluded for recovery. A statute of limitations is not a vested right but a matter of remedy, and may be taken away by statutory legislation. Where the same is changed before a bar has been perfected and a different period prescribed, the time that has expired is to be excluded, and the full term fixed by the new law must elapse, after its passage, before the bar is complete. — **Cox v. Davis,** 17 Ala. 714; **Doe ex dem. Trotter v. Moog,** 150 Ala. 460, 43 So. 710. See, also, **First National Bank v. Jackson County,** 227 Ala. 448, 150 So. 690; Quarterly Report of Attorney General, Vol. XVI, page 172.

In view of the foregoing, it is my judgment that your inquiry should be answered in accordance with the first paragraph in this opinion following your letter of inquiry.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 17, 1941.

Hon. J. Charles Stanley,
Tax Assessor, Calhoun County,
Anniston, Alabama.

Publication — Title 7, Section 713, 1940 Code —

Semi-weekly newspaper not disqualified from carrying legal advertisements.

Opinion by Assistant Attorney General Vardaman.

Dear Sir:

Your request for official opinion under date of June 9, 1941, is as follows:

"Kindly give me your official opinion on the following question:

"Whether or not The Anniston Times operating as a semi-weekly newspaper is qualified to carry legal advertisements."

It is my opinion that the fact that the Anniston Times is a semi-weekly newspaper is not determinant of whether or not it is qualified to carry legal advertisements.

This office has heretofore held that a weekly newspaper having a general circulation in the county in which it is published may carry legal notices. The same is true, of course, of semi-weekly papers which have the required circulation. I am herewith enclosing a copy of an opinion rendered to Hon. F. W. Moseley, of the Board of Revenue of Dallas County, which deals with this question.

Title 7, Section 713 of the Alabama Code of 1940 provides as follows:

"§ 713. Designation of newspaper and regulations regarding printing and publishing of legal advertisements. — The party in interest, or at whose instance the publication of notice is to be given by advertisement in a newspaper, may designate the newspaper in which such advertisement shall be made. If the officer charged with the duty of making the advertisement disregards such designation, and makes advertisement in some other paper, he must pay the costs thereof, and shall not be entitled to reimbursement; but all publications required by any law or mortgage or other contract to be published in a newspaper must be printed in whole or in part and published in the county in which the advertisement is published **and must be published in a newspaper printed in the English language which has a general circulation in the county in which it is published, which newspaper shall have been mailed under the second class mailing privilege of the United States post office department from the post office where it is published for fifty two consecutive weeks.** Provided, that if there is no newspaper printing plant in the county where the advertisement is published, the printing may be done in another county in the State of Alabama." (Emphasis supplied)

The underlined portion of the above quoted section is the only requirement that a newspaper must meet before it is qualified to carry legal advertisements.

Of course, if it were necessary that some notice be given daily for a certain number of days, such a notice apparently could not be published in a semi-weekly newspaper. However, I am not apprised of any instance where daily notices must be given.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 18, 1941.

Hon. Wm. T. Seibels,
Solicitor,
Montgomery County,
Montgomery, Alabama.

Montgomery County — Fifteenth Judicial Circuit — Assistant Circuit Solicitor — Deputy Circuit Solicitor — Salary —

Salary of Assistant Circuit Solicitor in Montgomery County payable in part by Montgomery County until beginning of term of office of Circuit Solicitor in said county to be elected in November, 1942.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion of June 12, 1941, follows:

"The Secretary of the Montgomery County Board of Revenue is contending that the Assistant Solicitor of the 15th Judicial Circuit is not now entitled to draw salary from Montgomery County (which is the 15th Judicial Circuit), but that he should now go under Sec. 255, Title 13, Code of 1940.

"I wish, therefore, to get you to give me an opinion construing Sections 255 and 259, Title 13, of the 1940 Code, so that I can determine the status of Mr. Robert G. Arrington, the present Assistant Solicitor of this Circuit, and who has also been appointed by me, to meet this new statute, Deputy Solicitor of the 15th Judicial Circuit.

"Mr. Heustess' contention is that Mr. Arrington goes immediately under the 1940 Code provisions. My position is that he continues as heretofore, until the officers elected in 1942 go into office, and that then he goes on the State pay roll as provided in this new statute, and not under the old law, (Local Acts, 1939, p. 44), on the Montgomery County pay roll.

"Specifically, I desire to know, and have your opinion hold, whether Mr. Arrington should be paid by the County until the State takes it over, as indicated in the new Code.

"If you will give me an opinion clarifying this situation, it will be very much appreciated by me.

By a local act the legislature created the office of Assistant Circuit Solicitor in Montgomery County with salary payable by the county. Act No. 83, H. 209, approved March 1, 1939, (Local Acts, 1939, p. 44).

Under Code, 1940, Title 13, §255, the Circuit Solicitor of the Fifteenth Judicial Circuit may appoint a Deputy Circuit Solicitor, "who shall serve in lieu

of all other Assistant Circuit Solicitors heretofore provided," -- salary "payable as the salaries of other state officers are paid."

Said Section 255, however, is not "operative and effective" until the beginning of the terms of office of Circuit Solicitors to be elected in the general election in November, 1942. Meanwhile, and until then, laws applicable and in effect when said code was adopted with respect to Solicitors, Circuit and Deputy Circuit alike, continue to apply as to their salaries, duties, etc. Code, 1940, Title 13, § 259 is as follows:

> "§259. Effective date of certain preceding sections.—Sections 227, 252-255, and subsection 12 of section 229 of this title shall become operative and effective upon the date of the commencement of the term of office of the circuit solicitor and deputy circuit solicitors, elected in the general election in November, 1942. The laws applicable and in effect at the date of the adoption of this Code shall with respect to said circuit solicitors and deputy circuit solicitors remain in full force and effect until the commencement of the term of office of the said circuit solicitors and deputy circuit solicitors elected in said general election, and not afterwards."

Inasmuch as the Act of March 1, 1939, supra, creating the office of Assistant Circuit Solicitor is still operative and effective at this time, so far as I am able to discover, the salary fixed therein must continue to be paid by Montgomery County until a Deputy Circuit Solicitor is appointed by the Circuit Solicitor in the Fifteenth Judicial Circuit after such Circuit Solicitor is elected in November, 1942. Until the begnning of his term when so elected, the Circuit Solicitor of said Circuit is not authorized apparently to appoint a Deputy Circuit Solicitor; his power of appointment until then is restricted to the appointment of an Assistant Circuit Solicitor whose status is unchanged by the insertion into the Code of 1940 of the provisions of Section 255 of Title 13 until the general election in 1942.

It is my opinion, therefore, that Montgomery County is not relieved of the duty of paying the Assistant Solicitor of Montgomery County at this time.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 19, 1941.

Hon. Lawrence K. Andrews,
Solicitor, Bullock County,
Union Springs, Alabama.

Counties —

> There is no authority of law under which the county governing body may donate money to the widow and children of a former employee who lost his life in the service of the county.

Opinion by the Attorney General.

Dear Sir:

Your letter of June 14, 1941, in which you request an official opinion, is as follows:

"On May 25, 1941, about eight o'clock P. M. an employee of the County of Bullock was watering the grass along the right of way of a County road by the use of a water truck, the property of the County. Such service for the County required him to operate this truck on the wrong side of the road and while so operating the same he was killed by an automobile travelling along the County road upon which he was working. The negligence of the operator of the automobile which caused his death, vel non, has not, as yet been judicially determined.

"The Court of County Commissioners of Bullock County has passed a resolution providing for the payment of a small amount of money to the widow and minor child of said employee; payment of said sum to be paid upon the approval of your office.

"Please advise me whether or not there is any authority for the payment of the money provided for in this resolution."

It must be taken as settled in this state that counties, being governmental agencies of the state, can be made chargeable with and liable for only such claims and obligations as the law imposes on them or authorizes or empowers them to contract for.

I know of no provision of law which expressly gives to the county governing body the right to expend county funds for the purpose mentioned in your letter nor do I know of any provision from which it could be said that it is necessarily implied that such an expenditure may be made.

This office has heretofore held that there is no authority under which county governing bodies may expend county funds for the purpose of defraying the hospital expenses of a county employee injured in the performance of his duties. Quarterly Report of Attorney General, Vol. XVIII, page 270.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 19, 1941.

Hon. W. L. DeVan, Administrator,
Alabama Alcoholic Beverage Control Board,
Montgomery, Alabama.

Alabama Alcoholic Beverage Control Board — Sacramental Wines —

1. Persons residing in a "wet" county must secure a permit from the Alabama Alcoholic Beverage Control Board before receiving sacramental wines shipped from without the State.

2. Shipments of sacramental wines to "wet" or "dry" counties must have affixed to the container the affidavit provided for in Code 1940, Title 29, Section 177, before entering the State, even though permission has been received from the Alabama Alcoholic Beverage Control Board under Code 1940, Title 29, Section 206.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your request for official opinion, under date of May 28, 1941, is as follows:

"Under date of August 16, 1937, the Attorney General's Office rendered an opinion to Hon. Matt A. Boykin holding that the Alabama Beverage Control Act did not repeal Sections 4736-4739 of the 1923 Code of Alabama relative to sacramental wines.

"The new Code of Alabama deals with sacramental wines in Sections 74, 175, 176, 177, 178, 204, 206, 207 and 208. The only changes in these sections from the old Law and Code are the insertion of the words 'Alabama Alcoholic Beverage Control Board' in the place of 'Judge of Probate'.

"Due to the fact that the new Code goes into effect on May 31 we would like to have your opinion as soon as possible on the following:

"Do all persons residing in a wet county, authorized to purchase sacramental wines, have to secure a permit from the Alcoholic Beverage Control Board before receiving such wines?

"Must all shipments of sacramental wine have affixed to the containers the affidavit provided for in the Code before shipping into the State even though permission has been received from the Alcoholic Beverage Control Board authorizing such shipments?"

Answering your first inquiry, it is my opinion that persons residing in a "wet" county, authorized to purchase sacramental wines, must secure a permit from the Alabama Alcoholic Beverage Control Board before having such wines shipped from outside of the State. This office has heretofore held, in an

opinion rendered to Hon. Matt A. Boykin, Probate Judge of Mobile County, under date of August 16, 1937 (Quarterly Report of Attorney General, Volume VIII, page 113), that persons residing in a "wet" county and desiring to procure wines for sacramental purposes from other than State Stores, must comply with the provisions of Sections 4736-4739 of the Code of Alabama, 1923.

Sections 4736-4739 of the Code of Alabama, 1923, have been brought forward into the Code of 1940 as Sections 204-208 of Title 29, with amendments providing for reports to be filed with the Alabama Alcoholic Beverage Control Board, and requiring permits to be secured from such Board. Section 206 of Title 29 (Section 4737, Code of 1923) provides as follows:

> "§ 206. Permit from alcoholic beverage control board to have wine shipped from outside the state. — When any such person desires to have shipped from outside of the state, wine for sacramental purposes in the usual religious exercises of his denomination, **he may apply to the board for a permit,** stating the amount desired, during what period and for what purpose, and said board, if satisfied of the good faith of the application, shall grant a written permit to the applicant, permitting the shipment of such amount as is shown to be reasonably necessary, to be stated in the permit, for the time stated for such purpose, not to exceed five gallons at one time, **which said permit is to be attached to the package when shipped into the state."** (Emphasis supplied)

Applying the reasoning employed in the Boykin opinion, supra, in construing Section 206, it follows that persons desiring to have sacramental wines for religious purposes shipped from without the State must apply to the Board for a permit.

The opinion of this office appearing in Quarterly Report of Attorney General, Volume XII, page 39, is not in conflict with the conclusion herein reached. It is true that it was held in that opinion that under Section 58 of the original Alabama Beverage Control Act (Section 74 of Title 29, Code of 1940), that the Alabama Alcoholic Beverage Control Board was without authority to promulgate a rule or regulation limiting the right of the persons described in such section to acquire and disperse the beverages referred to therein. However, as has been heretofore pointed out, specific authorization for the issuance of a permit by the Board has been inserted into the 1940 Code in Section 206 of Title 29 and must, therefore, be considered as controlling. **Bush v. Greer,** 235 Ala. 56, 177 So. 341; **State v. Towery,** 143 Ala. 48, 39 So. 309.

Answering your second inquiry, you are advised that a person residing in either "wet" or "dry" counties must make the affidavit provided for by Section 177 of Title 29 and a copy of such affidavit must be pasted or permanently attached to the container of the alcoholic beverage or wine when the same is shipped into the State of Alabama, and is received by the applicant from the carrier, even though such applicant has obtained the permit from the Alcoholic Beverage Control Board provided for in Section 206 of Title 29.

Section 177 of Title 29 finds its origin in Section 4708 of the Code of Alabama, 1923, and as above noted, Section 206 of Title 29 is adopted from Section 4737 of the Code of Alabama, 1923. Under the Code of Alabama, 1923, Sections 4708-4737, it was apparently necessary that both the permit and the

affidavit be obtained and affixed as required. I find nothing in the codification of these sections to indicate a different intention. Accordingly, it is my opinion that persons desiring to have wines for sacramental uses shipped to them from out of the State must obtain the permit from the Alabama Alcoholic Beverage Control Board, and, in addition thereto, must make and attach the affidavit prescribed by Section 177 of Title 29, supra.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 20, 1941.

Hon. E. L. Hurst,
Judge of Probate,
Etowah County,
Gadsden, Alabama.

Licenses — Amusement Parks —

1. A person owning or operating a permanent amusement park, open for the public for not more than five months in the year, and located within a city or town, or within five miles from the corporate limits thereof, is within the purview of Schedule 8 of Section 348 of the 1935 Revenue Act (Code, 1940, Tit. 51, § 458), and, upon the payment of the license levied thereby, is exempt from the payment of the licenses on amusements or entertainments operated at such amusement park.

2. A person owning or operating an amusement park which is not permanent, is open for the public for more than five months in the year, or is located more than five miles from the corporate limits of a city or town is not within the purview of said Schedule or section, and, therefore, the payment of the license levied thereby would not exempt such person from the payment of the licenses levied on amusements or entertainments operated at such amusement park.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of May 28, 1941, is as follows:

"I will greatly appreciate it if you will render me an opinion on a question of a license or privilege tax. The section that is up for interpretation is described as follows:

"License or Privilege Tax Motor Vehicle Schedules and General Provisions, Article 8, Chapter 1, Schedule 8. This Schedule sets out the amount of the license for amusement parks. You will notice that Schedule 8 lists the amount of license charged according to the population of cities, and further states that the license is applicable if the amusement park is within five miles of one of these specified cities.

"The point I want to know is whether or not the operator of an amusement park that is more than five miles from any one of these designated cities can be required to pay this license outlined under Schedule 8. You will notice that this Schedule 8 does not go on to specify, as the other Schedules do, that a certain license is required if the town or community is unincorporated."

The schedule to which you refer is Schedule 8 of Section 348 of the 1935 Act, which appears as Section 458 of Title 51 of the Code of Alabama, 1940, which became effective on May 31, 1941. Said Section 458 reads as follows:

"§ 458. Amusement parks.—Owners and operators of permanent amusement parks which shall be open for the public for not more than five months of each year may be exempted from payment of the license or privilege taxes on amusements or entertainments licensed by this title, provided they take out and pay for a license to operate a permanent amusement park at the following rates to-wit: In cities or towns of less than five thousand inhabitants, or within five miles thereof, twenty-five dollars; in cities or towns of five thousand inhabitants and less than fifteen thousand inhabitants, or within five miles thereof, fifty dollars; in cities of fifteen thousand and less than twenty-five thousand inhabitants, or within five miles thereof, one hundred dollars; in cities of twenty-five thousand or more inhabitants or within five miles thereof, two hundred dollars. The provision of this title permitting the payment of a half year license after April 1st shall not apply to this section. Provided no license shall be paid under this section by any town or city which itself owns and operates an amusement park. (Ib)"

In my opinion, a person owning or operating an amusement park located more than five miles from the corporate limits of a city or town, is not within the purview of said section.

This office, in an opinion rendered to Hon. Harry Simon, State Tax Commission, Montgomery, Alabama, under date of December 21, 1937 (Quarterly Report of Attorney General, Volume XI, page 167), considered the question of whether or not an automobile dealer who had a place of business outside the corporate limits of a city or town was liable for the license levied by Schedule 12 of Section 348 of the 1935 Revenue Act, as amended. In reaching the conclusion that such a person was not liable for the license levied by said schedule, as amended, it was stated in that opinion:

"In answer to your first question, it is my opinion that no license is levied under said Schedule 12, on a place of business outside a city or town. Schedule 12, Section 348, as amended by the Act No. 163, Extra Session 1936-37, provides a license shall be levied and collected.

"' *** for each place of business, to-wit: in cities or towns having a population of:

2,500 or less $50.00

over 2,500 to 5,000 ..... $75.00 etc.'

"No license is expressly levied for any place of business outside a city or town. In numerous schedules, the words are used 'all other places' (Sched. 1) or 'all other places whether incorporated or not,' (Sched. 3, 7, 16, 32, etc.). The failure to use a similar phrase in Schedule 12 indicates a clear legislative intention to levy such license only on those places of business in a city or town."

On the basis of the logic and conclusion of that opinion, you are advised that a person owning or operating an amusement park located more than 5 miles from the corporate limits of a city or town, is not within the purview of Title 51, Section 458, supra.

You will note that I have referred hereinabove to an amusement park located more than five miles from the **corporate limits** of a city or town. The reference in Title 51, Section 458, supra, is to amusement parks "in cities or towns," "or within five miles thereof." This means within five miles of the corporate limits. See opinion to Hon. G. H. Howard, Judge of Probate, Wetumpka, Alabama, under date of December 29, 1939 (Quarterly Report of Attorney General, Volume XVII, page 421), and authority therein cited.

Your attention is called to the fact that said section is applicable only to amusement parks that are (1) permanent, (2) open for the public for not more than five months in the year, and (3) located within a city or town, or within five miles of the corporate limits thereof; and that it is optional, and not mandatory, that the license levied thereby be secured. Consequently, it is my opinion that a person owning or operating an amusement park to which the above section is applicable can not be required to secure the license levied thereby, but that he may secure the same, and, if he does, he is exempt from paying the license levied on amusements or entertainments operated at such amusement park, such as the license on flying jennies, merry-go-rounds, etc., levied by Schedule 64 of Section 348 of the 1935 Revenue Act (Code 1940, Tit. 51, § 527). See opinion to Hon. G. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of July 7, 1936 (Quarterly Report of Attorney General, Vol. IV, page 11), On the other hand, a person operating an amusement park to which the above section is applicable who does not secure the license levied by said section would be liable for the licenses levied on all amusements and entertainments operated at such amusement park.

A person who owns or operates an amusement park that is (1) not permanent, (2) open to the public more than five months in the year, or (3) located more than five miles from the corporate limits of a city or town, cannot be required to secure the license levied by said section, nor will the payment of the license levied thereby exempt such a person from the payment of the licenses levied on the amusements or entertainments operated at such amusement park, as such a person is not within the purview of said section.

While there is no license levied on a person owning or operating an amusement park, not within the purview of said section, for the privilege of owning or operating an amusement park, such person would be liable for the payment of the licenses levied on all amusements or entertainments operated at such amusement park.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 20, 1941.

Hon. Walter Pettus Gewin,
Deputy Circuit Solicitor,
Hale County,
Greensboro, Alabama.

Criminal Jurisdiction of State Courts Over Lands Acquired by the Federal Government —

1. The State court's criminal jurisdiction extends to all Federal forest reservations lying in the state.

2. State courts are without criminal jurisdiction of offenses committed on property acquired and used by the Federal government for post offices, locks and dams.

3. Changes in Code 1940, Title 59, Section 19, with respect to jurisdiction over ceded lands, will not affect these conclusions, except insofar as future acts or instruments of cession relating to acquisition of lands may impose different restrictions.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your letter of May 10, 1941, in which you request an official opinion, is as follows:

"The purpose of this letter is to request your opinion as to the jurisdiction of the various State courts of this County to try persons for offenses alleged to have been committed on property owned and controlled entirely by the United States of America. By reference to Courts of this County I mean Justice of the Peace Courts, County Court of Hale County and the Circuit Court of Hale County, Alabama.

"In the Northern portion of this County the United States of America has purchased from private individuals many thousand acres of land,

and the title thereto is in the United States. When the purchases were made it was the announced purpose of the United States to set up a planned land use demonstration project. As a matter of fact this area is now regarded somewhat as a National Forest. After acquiring the property the United States constructed thereon a large artificial lake. Are parties fishing in this lake in violation of the Fish and Game laws of the State of Alabama subject to prosecution for such violations in the State Courts of proper jurisdiction of this County?

"In view of the decision of the Supreme Court of this State in the case of Blair v. State, 191 So. 237, I will state that the area mentioned above is not being used at the present time, nor has the same been used in the past for the erection of Forts, Magazines, Arsenals, etc.

"Further, I request your opinion as to the jurisdiction of State Courts generally to try persons who have committed any crime on property owned by the United States of America such as post office sites the title to which is in the United tSates and reservations on navigable streams for the erection and maintenance of locks and dams?

"In view of the fact that there have been some changes in the new 1940 Code I further request your opinion as to the answers to the above inquiries after May 31st, 1941, the effective date of the new code. The changes referred to relate specifically to the jurisdiction of the State of Alabama over such lands or property as mentioned and described in this letter."

Your several questions present, when properly considered, the sole question of whether the places upon which the offenses are, or might be committed are within the exclusive jurisdiction of the United States. Whether or not the National Government has acquired exclusive jurisdiction over the crime there committed, depends upon the terms of the consent or cession given by the State of Alabama. As stated by the text writers in 22 Corpus Juris Secundum, 230, Section 139:

"The federal courts have exclusive jurisdiction over offenses committed on lands within a state lawfully purchased by the federal government with the consent of the state legislature for the erection of forts, magazines, arsenals, dockyards and other needful buildings, or for any other lawful purpose; and the same applies to offenses committed on land ceded by a state to the federal government where the state under the terms of the cession expressly relinquishes, or fails to reserve, its jurisdiction."

Cf. 16 Corpus Juris 172, 173, Section 222.

The Supreme Court of Alabama, in **State v. Blair,** 238 Ala. 377, 191 So. 237, has held that, in view of the provisions of Sections 1505 and 1506 of the Code of 1923, the United States acquires exclusive jurisdiction over all places acquired for the purposes detailed in Article 1, Section 8, Clause 17 of the Constitution of the United States. Cf. **O'Pry Heating & Plumbing Co. v. State,** 3 Div. 347, (Supreme Court, MS).

This provision of the Constitution of the United States is as pertinent as follows:

> "The Congress shall have power *** to exercise exclusive legislation in all cases whatsoever *** over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards and other needful buildings."

The broadest construction has been placed upon the phrase, "other needful buildings." In **James v. Dravo Contracting Company,** 302 U. S. 134, 143, locks and dams were held to be "needful buildings." See also **United States v. Tucker,** 122 Fed. 518, 522. In **Battle v. United States,** 209 U. S. 36, 37, it was held by the Supreme Court of the United States that "post offices are among 'other needful buildings.'" within Clause 17. Of consequence, your inquiry concerning the jurisdiction of state courts to try persons who have committed a crime on property owned by the United States and used as a post office site, or as a lock or dam, must be governed by the rule of the Blair case, supra; i. e., the state courts are without jurisdiction of offenses committed on such property. Cf. **Bowen v. Johnston,** 306 U. S. 19, 28.

As has been hereinabove stated, the question of the jurisdiction of state courts with respect to offenses committed on property acquired by the United States for use as a National Forest depends upon the terms of the consent or cession given. I have found no statute or instrument of cession granting exclusive jurisdiction to the United States Government with respect to such property. Nor have I found judicial decisions indicating that such property might be included within the phrase, "other needful buildings." To the contrary are decisions of the Court of Appeals of Alabama in **Hagood v. State,** 23 Ala. App. 138, 122 So. 299, and **Garrison v. State,** 22 Ala. App. 444, 116 So. 706. In each of these opinions of the Court of Appeals, it is concluded that the criminal jurisdiction of the state extends over and covers all Federal forest reservations lying and being in this state. Accordingly, you are advised with respect to your inquiry regarding the prosecution of persons violating the Game and Fish laws in such National Forest, that State courts of proper jurisdiction may entertain prosecutions for such offenses.

All that hereinabove has been said with respect to the jurisdiction of State courts of prosecutions for offenses committed on property acquired by the Federal Government, will be applicable after the effective date of the 1940 Code, with respect to those places acquired by the Federal Government before the effective date of the New Code; i. e., May 31, 1941.

Code 1940, Title 59, Section 19, provides in such regard that:

> "The jurisdiction heretofore ceded to the United States over any lands acquired by it within the State of Alabama, with the consent of the state, shall be subject to such reservations, restrictions, and conditions as provided in the act or instrument of cession relating to such acquisition; and shall be subject to the exercise by the state of such jurisdiction, rights, privileges, or powers as may now or hereafter be ceded by the United States to the state."

Since, under the acts or instruments of cession relating to the acquisition of the lands acquired for use as post office sites and for the erection and maintenance of locks and dams, the Federal Government acquired exclusive jurisdiction, as hereinabove noted, such exclusive jurisdiction will continue, under the foregoing provision of Title 59, Section 19.

As to land hereafter acquired by the United States within the State of Alabama, with the consent of the State, the same rule will apply, unless otherwise expressly provided in the act or instrument of cession. In such cases, it is provided by Title 59, Section 19, that:

> "The jurisdiction ceded to the United States over any lands hereafter acquired by it within the State of Alabama, with the consent of the state, pursuant to the provisions of this title or any other law of the state, unless otherwise expressly provided in the act or instrument of cession, shall be subject to the following reservations, restrictions, or conditions: The jurisdiction so ceded shall not prevent the execution upon such lands of any process, civil or criminal, issued under the authority of this state, except as such process might affect the property of the United States thereon. The state expressly reserves the right to tax all persons, firms, corporations, or associations now or hereafter residing or located upon such lands. The state expressly reserves the right to tax the exercise by any person, firm, corporation, or association of any and all rights, privileges, and franchises upon said lands; and to tax property of all persons, firms, corporations, or associations situated upon such lands. The jurisdiction ceded to the United States shall be for the purposes of the cession, and none other; and shall continue during the time the United States shall be or remain the owner thereof and shall use such lands for the purpose of the cession. The state expressly reserves the right to exercise over or upon any such lands any and all rights, privileges, powers, or jurisdiction which may now or hereafter be released or receded by the United States to the state."

Answering your specific inquiries, and basing the answers upon the 1940 Code, you are advised that the jurisdiction of state courts of prosecutions for offenses committed on property acquired by the Federal Government on or after May 31, 1941, will depend entirely upon the act or instrument of cession under which the lands are acquired. In the absence of any specific provision in the act or instrument of cession, the same rules applicable with respect to prosecutions for offenses committed on lands acquired before May 31, 1941, will govern.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 20, 1941.

Hon. B. M. Bains,
County Solicitor,
Blount County,
Oneonta, Alabama.

Rights-of-Way — Condemnation — Parties — Counties —

1. Application to condemn right-of-way for public road constructed under Code, 1940, Title 23, in a county should be made in the name of the county by order of the governing body of the county.

2. All parties having or claiming to have any interest in the property condemned should be made parties to such application.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

I have your letter of June 13, 1941, in which you request my official opinion as follows:

"I am writing this letter asking your opinion as to the proper proceedings to acquire right-of-way over the city lots, beginning at Station 2863 +40 to Station 2865 +47, in Oneonta, Alabama. The facts are as follows:

"W. A. Paden died some 10 or 15 years ago, the owner and in possession of the following lots in the Town of Oneonta, Lots 298, 297, 296, 295, 294 and 251 in Block No. 23. He left a widow and five daughters, all of whom were over the age of 21 years. Four of the daughters married and moved away from the County. One of them is still single, and the widow has since died not having her homestead exemption set apart to her. During the life of the widow, she gave a deed in connection with her single daughter to a right-of-way over these lots. Since her death there has been a contract or agreement made between Blount County, and the State Highway Department of Alabama to construct a highway from Blountsville to Oneonta, Alabama, and by the report of the surveyors, said highway must acquire a strip 40 feet wide and approximately 270 feet long over these lots, widening a previous right-of-way. By the terms of this agreement Blount County is to acquire all right-of-ways, so I am asking you how is the proper way to proceed to acquire this right of way; whether or not the County by application to the Board of Commissioners to acquire by Eminent Domain, or whether or not the State Highway Department or the Federal Department, either or both, have acquired such jurisdiction over this highway project as that they would have to petition for the right-of-way, or whether the County could petition in its own name and right, or whether it could petition in the name and for the use of the State, and whether it is necessary for the State of Alabama to give Blount County some authority to petition the board of Commissioners to condemn this land for a right-of-way. The heirs of W. A. Paden, by their

attorney, has given notice of protest, since the contractor had done some little preliminary work on this strip of land sought to be acquired. He has also given notice that Mr. Chris Sherlock and also Mr. T. S. Burnum be summonsed to appear at the hearing when set."

Under the circumstances above stated, counties are required, without expense to the state, to acquire rights-of-way necessary for roads to be constructed in the county. Code of 1940, Title 23, §25, is as follows:

"§25. Right of way for roads; how acquired. — The right of way deemed necessary by the highway department for a road or bridge constructed under the provisions of this chapter shall be acquired by the county in which such road is to be located, without expense to the state. Should the county fail or refuse to acquire the necessary right of way, the state through the highway department shall have authority at the expense of the county to acquire such right of way, either by purchase or by the exercise of the right of eminent domain in condemnation proceedings, as is provided for under the laws of this state."

For such purposes, application may be made in the name of the county to the probate court for an order condemning such rights-of-way. Code of 1940, Title 19, §1; Title 23, §44; **McConnell v. Goodwin,** 189 Ala. 390, 66 So. 675; Biennial Report of Attorney General, 1934-36, page 152; Biennial Report of Attorney General, 1926-28, page 739.

In such cases the proper procedure is prescribed by Code of 1940, Title 19, §§3-7, 10-16. See also, **Stout v. Limestone County,** 211 Ala. 227, 100 So. 352. I call your attention to the case of **Mobile County v. Barnes-Creary Supply Co.,** 225 Ala. 127, 142 So. 72, which case, in my opinion, sheds light on your inquiry. In that case, Mr. Justice Gardner said as follows:

"The citation of the foregoing authorities should suffice to demonstrate that the bill has equity. But counsel for appellant (the county of Mobile) insists that these principles are not here applicable for the reason that this particular highway was being improved under the supervision of the state and federal government authorities, to which Mobile county only contributed some of its funds as authorized by law, citing Local Acts 1927, p. 151, §8; Gen. Acts 1927, pp. 355-392, §§23, 36, 38, 158, and 159; Adler & Co. v. Pruitt, 169 Ala. 213, 53 So. 315, 32 L. R. A. (N.S.) 889.

"We are of the opinion, however, this argument overlooks the express provision of section 31 of the General Act above noted (General Acts 1937, p. 358) to the effect that as to such improvements the duty rested upon the county to acquire the right of way deemed necessary for the purpose without expense to the state, and that in the event the county fails or refuses to do so, the state may acquire the same either by purchase or by condemnation proceedings, at the expense of the county. The duty therefore was upon the county to acquire the right of way, and the county was a party to these improvements by a contribution of one-half the cost. True, the improvements were upon the old right of way, but the level of the road in front of complainant's property was raised several feet, and a viaduct in course of construction thereon, working injury to

complainants property, accepting of course as true the bill's averments. This the county could not do, under our Constitution and the above-noted authorities, without first having made compensation therefor.

"Confessedly also the actual work was under state supervision, but the foundation duty of obtaining the right of way rested upon the county, a party to the project, and the county cannot escape responsibility for failure on its part, by reason of suggestions as to practical obstacles in the way of enforcement of injunctive relief. The equity of the bill being established, a court of equity, if the enforcement of such injunctive relief appears impracticable or unjust, has the power to so mold its decree as to award damages in lieu of such relief. 21 Corpus Juris, 143; 32 Corpus Juris, 384; Hill v. Johnson, 214 Ala. 194, 106 So. 814; Bullock v. Tuttle, 90 Ala. 435, 8 So. 69; Sims v. McEwen, 27 Ala. 184; Bromberg v. Eugenotto Con. Co., 158 Ala. 323, 48 So. 60, 19 L. R. A. (N.S.) 1175; Olive v. Fayette County, 219 Ala. 172, 121 So. 703.

"The argument to the contrary is, we think, untenable.

"We have examined the authorities relied upon by appellant (among them Finnell v. Pitts, 222 Ala. 290, 132 So. 2; Adler & Co. v. Pruitt, 169 Ala. 213, 53 So. 315, 32 L. R. A. (N.S.) 889; Hamilton v. Jefferson County, 209 Ala. 517, 96 So. 628; Phillips v. Tuscaloosa County, 212 Ala. 357, 102 So. 720), but we find nothing in them which militates against the conclusion here reached.

"The insistence that complainant is estopped to now complain of the improvements finds no support in the bill, as it nowhere appears they were being constructed at complainant's invitation. Such was the case presented in O'Neill v. City of Birmingham, 221 Ala. 580, 130 So. 87, relied upon by appellant, but unsupported here by any averments of the bill."

All parties having, or claiming to have, any interest in the property to be condemned should be made parties to the application filed in the probate court, so as to foreclose any future claim on their part for damages by reason of the taking of the land, or any interest therein. **Alabama Power Company v. Herzfeld**, 216 Ala. 671, 114 So. 49.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 20, 1941.

Hon. M. H. Watson, President,
Calhoun County Board of Education,
Anniston, Alabama.

Schools — County Board of Education — Attorneys —

A county board of education is authorized to employ an attorney in connection with condemnation proceedings instituted by the Federal Government to condemn property under the control and supervision of the said board.

Opinion by Assistant Attorney General Screws.

Dear Sir:

I have your letter of May 28, 1941, in which you request my opinion as follows:

"Please advise me if the Calhoun County Board of Education can legally retain a law firm for the purpose of advice and legal assistance on matters coming before the Board. At the time being, we are having some property condemned by the Federal Government and from time to time matters arise on which we need legal advice, therefore, I request an opinion from you if we may retain a law firm to represent us in legal services needed."

In answer to your inquiry, it is my opinion that the County Board of Education has authority to employ an attorney in connection with condemnation proceedings instituted by the Federal Government to condemn property under the control and supervision of said board.

The rule relative to the employment of attorneys by county boards of education is set out in an opinion of this office found in Biennial Report of Attorney General, 1930-32, page 763. The pertinent part of said opinion is as follows:

" 'Section 132 of the School Code, 1927 provides that the County Board of Education may sue and contract, which provision, of necessity involves the liability of being sued. The authority to sue and to be sued, of necessity, carries with it the authority to employ and compensate counsel, when such Board is acting within the scope of its authority, and when counsel for such purposes has not been provided by law.—**Jack v. Moore,** 66 Ala. 188; Biennial Report Attorney General, 1926-28, page 418.

" 'However, such agents as boards of education are without authority to employ counsel in cases where counsel may by law be provided, whether by special provision by statute or by implication. The law provides instances where the Board of Education is to be advised by the Attorney General, or by possible implication, by the County Solicitor; also, where the State is a party in interest directly or indirectly the law provides that

the Solicitor and Attorney General shall prosecute or defend its interest. In such instances the Board of Eductaion would not be authorized to employ counsel but must avail itself of the counsel provided by law.—Biennial Report Attorney General, 1926-28, page 418, supra.'"

Section 132 of the School Code of 1927 now appears as Section 99 of Title 52 of the Code of 1940.

In supplying the above quoted rule, this office has held that County Boards of Education have authority to employ attorneys to represent said boards in injunction suits (Biennial Report of Attorney General, 1934-36, page 125), in mandamus proceedings (Biennial Report of Attorney General, 1934-36, page 256), and to prepare necessary papers, etc. in order to secure a loan (Biennial Report of Attorney General, 1936-38, page 95).

Reasoning by analogy, it is my opinion that a county board of education may employ an attorney in connection with condemnation proceedings affecting the property under its supervision and control. This would not be a duty imposed upon the Attorney General or the Circuit or County Solicitor.

Under Title 52, Section 71 of the Code of 1940 (Section 95 of the School Code of 1927), all property, etc. vested by law in public school authorities of any county for the benefit of the public schools of any county are vested in the County Board of Education. It is the duty of said board to protect its interest in any property under its supervision and control, and it may employ an attorney for this purpose.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 20, 1941.

Hon. John Brandon,
Secretary of State,
THE CAPITOL.

Elections — Boards of Registrars —

Section 47, Title 17, Code of 1940, construed to read "second Monday in February, 1940" instead of "second Monday in February, 1941", in conformance with the evident intention of the Legislature and in derogation of the literal import of the language used.

Opinion by Assistant Attorney General Hare.

Dear Sir:

I have your letter of May 27, 1941, in which you request my official opinion as follows:

"Your opinion is requested on the following question with reference to the Code of Alabama of 1940.

"Section 394 of the Code of Alabama, 1923, provided that the Board of Registrars shall meet in each county on the second Monday in December of odd years. However, the 1927 Acts, page 276, while not specifically amending Section 394, amended Section 393 providing that the person whose name was proposed to be stricken could appear before the Board on the second Monday in February of even years. I call your attention to Title 17, Section 47 of the Code of Alabama of 1940, which reads as follows:

" 'The board of registrars shall meet in each county on the second Monday in February, 1941, and every two years thereafter and may continue in session one week for the purposes mentioned in the preceding sections.'

"I call your attention also to the Editor's note, which reads as follows:

" 'Code 1923, sec. 394, the predecessor of this section, was considered to have been repealed by implication by Code 1923, sections 392, 393 (now sections 44 and 46 of this title). Rep. Atty Gen. 1926-28, p. 413. But note that said section 394 was rewritten in its inclusion in this Code.—Ed. note.'

"Please advise if, in your opinion, the Code Committee erred in having Section 47 so read as above quoted, providing that the Boards of Registrars shall meet on the second Monday in February of 1941 and every two years, and that if this section should not read that the Boards shall meet on the second Monday in February of even years. I am of this opinion because Section 44 of the new Code, same title, provides that the Boards of Registrars shall meet in January of even years for purging the registration list. Section 46 states that notice of intention to strike the name shall be furnished the person, to appear before the Board on the second Monday in February following, which is certainly an even year. Section 47, following, should, therefore, in my opinion, provide for the meeting in February in even years."

A proper interpretation of Section 47, Title 17, Code of 1940, demands a historical consideration of it and its related sections.

Sections 44, 46 and 47 of said title first appeared in the General Acts of 1903 as Sections 18 and 19 of Act No. 480, H. 207, approved October 10, 1903 (General Acts, 1903, page 438). In short, those sections provided for meetings of the Board of Registrars on the second Monday in August, 1904, and on said date each two years thereafter for purging the registration list. Provision was made for notice to certain electors whose names were stricken. The fourth Monday in August, 1940, and the same date each two years thereafter was designated as the time for hearing protests. These two sections were incorporated without material change as Sections 323, 324 and 325 of the Code of 1907.

In 1920, by Act No. 78, H. 11, approved October 2, 1920, page 124), the Legislature passed a general statute "to provide for the registration of electors *** ." Sections 23, 24 and 25 of said act operated to supersede the above sections of the Code of 1907 and effectuated a change in the dates of meetings to "the second Monday in November, 1921, and every two years thereafter, for purging the registration list" and to "the second Monday in December, 1921 and every two years thereafter" for hearing of protests.

Said Sections 23, 24 and 25 were incorporated in the Code of 1923 as Sections 392, 393 and 394, without material change. In 1927, by Act No. 289, S. 179, approved August 20, 1927 (General Acts, 1927, page 274), the Legislature amended Sections 392 and 393, changing thereby the dates of meetings of the Board of Registrars for purging the registration list and the time of hearing of protests to "the first Monday in January, 1928, and every two years thereafter" and "the second Monday in February, following" respectively.

This office, in an opinion to Hon. S. H. Blan, State Auditor, (Biennial Report of Attorney General, 1926-28, page 413) held that Sections 392 and 393, as amended, repealed by implication Section 394 which had not been amended, and, consequently, provided a date for the hearing of protests other than that so fixed in Section 393. It is my opinion that this construction was proper.

By Act No. 460, H. 926, approved September 13, 1935 (General Acts, 1935, page 989), Section 392 was again amended but without change material here.

The Code of 1940 incorporates Section 392, as last amended supra, Section 393, as last amended supra, and Section 394 as Sections 44, 46 and 47 of Title 17. Section 47 reads as follows:

> "§ 47. **Time and place of meeting.**—The Board of registrars shall meet in each county on the second Monday in February, 1941, and every two years thereafter and may continue in session one week for the purposes mentioned in preceding sections."

The Code Committee, with evident intent to make the sections conform, rewrote Section 394 as Section 47, changing "the second Monday in December, 1921" to read "the second Monday in February, 1941", and added at the end of the section the following: "for the purposes mentioned in preceding sections."

The premises considered, I am of the opinion that the evident intention is different from the literal import of the language used and that such intention should prevail; that the phrase "the second Monday in February, 1941" as it appears in Section 47, Title 17, Code of 1940, should be properly construed as "the second Monday in February, 1940", thereby bringing it into conformity with Section 46 and giving it some rational purpose and meaning. **Reynolds v. Fabritis**, 233 Ala. 625, 172 S. 889; **Tuscaloosa County v. Shamblin, 233 Ala. 6**, 169 So. 234; 59 Corpus Juris, 991.

Any other construction would throw the registration statutes in this particular into inextricable confusion.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 21, 1941.

Hon. B. P. Singleton,
Chief Examiner of Public Accounts,
THE CAPITOL.

Costs and Fees in the Jefferson County Court of Misdemeanors —

1. The fees of the Judge of the Jefferson County Court of Misdemeanors for issuing complaint and warrant in bastardy proceedings the the same as allowed a justice of the peace for the same service.

2. There is no authority of law for a final record in the Jefferson County Court of Misdemeanors.

3. The fees for issuing complaint and warrant in the Jefferson County Court of Misdemeanors are the same as in justice courts as to misdemeanors and bastardy proceedings. The other costs chargeable are the same as in county courts.

4. Where the defendant is convicted in the Jefferson County Court of Misdemeanors and pays fine and costs, the Clerk is only entitled to a fee for judgment, but when the defendant is sentenced to hard labor, the Clerk is entitled to the fee for judgment and also a fee for sentence.

Opinion by Assistant Attorney General Haynes.

Dear Sir:

I have your letter of May 29, 1941, which is as follows:

"In Re: Our letter under date of April 2, 1941. Your Request No. 961-A.

"I respectfully ask that you permit me to withdraw my request to you, referred to above, and submit in lieu thereof the following request:

"1. The Jefferson County Court of Misdemeanors having authority to issue warrants in Bastardy Cases, would not the fees for this service be:

Section 3753, Code of 1923

For issuing a warrant in Bastardy proceedings	$1.00
For taking examination in Bastardy proceeding	.50
	$1.50

"Local Laws 1919, page 121.

2. The law establishing the Jefferson County Court of Misdemeanors does not require of the Clerk the making or keeping of a Final Record.

The Clerk does not make or keep a final record but charges in his bill of costs to the state seventy-five cents for such a service. Is not this fee properly to be charged back as an overpayment by the State Department of Corrections & Institutions and now due by Jefferson County to the State of Alabama?

"3. Are fees legally chargeable in this Court the same as fees now allowed in the several County Courts of Alabama with the exceptions as follows:

Final Record — None.

Warrant and Complaint — Seventy-five cents.

Warrants and examination in Bastardy proceedings — One dollar and fifty cents.

"4. In Misdemeanor cases convicted in the Jefferson County Court of Misdemeanors where the defendant pays the fine and costs imposed, is there only one fee of twenty-give cents for judgment? If sentenced to Hard Labor to pay fine and costs are both fees for entering judgment twenty-five cents and entering sentence twenty-five cents applicable?"

My answer to your first question is in the affirmative. Section 8 of the act creating the Jefferson County Court of Misdemeanors, which act is No. 323, H. 787, approved September 10, 1919 (Local Acts, 1919, page 121), provides in part as follows:

"For his services in taking affidavits and issuing warrants the said judge is entitled to the compensation now provided by law to justices of the peace or which may hereafter be provided."

Therefore, it is my opinion that the judge of the Jefferson County Court of Misdemeanors is entitled to the fees set out in your request. See Code of 1940, Title 11, Section 96 (Code of 1923, Section 3753).

My answer to your second question is also in the affirmative.

While it is true that Section 8 of the Act of 1919, supra, creating the Jefferson County Court of Misdemeanors, provides, among other things:

"The said court herein provided for shall be a court of record with a seal, and the judge or clerk thereof shall have authority to certify the records and proceedings of said court.",

I find that Section 13 of said act provides, among other things, as follows:

"§13. That the duty of the clerk of said court shall be to keep a record of all proceedings of the said court; he shall keep in a book, to be furnished by the Board of Revenue of Jefferson County, a properly ar-

ranged docket of all cases tried in said court and all examinations had therein, which docket shall set forth the nature of the case, the date of the issuance and return of all processes, and a statement of the judgment rendered in the case sufficiently clear to show what was done in the case, together with an itemized statement of the bill of costs and by whom paid. *** "

The above quoted excerpt from Section 13 describes the records which shall be kept by the clerk of the Jefferson County Court of Misdemeanors. In my opinion, the description does not include what is commonly known as a "final record." The making of a final record applies to circuit courts or to courts of like jurisdiction from which appeals lie directly to the Supreme Court or Court of Appeals. This is not true as to the Jefferson County Court of Misdemeanors as an appeal from this court lies directly to the circuit court and is there tried de novo. An appeal from the circuit court or court of like jurisdiction to the Supreme Court or Court of Appeals is tried on the record which may contain a bill of exceptions. Therefore, it is important that the record in the circuit court or court of like jurisdiction be complete. All that is necessary to go in the record of a case tried in the Jefferson County Court of Misdemeanors are those things set out and designated in Section 13 of the Act, supra, not including a final judgment. A final judgment is one from which an appeal may be taken to the Supreme Court or Court of Appeals.

My answer to your third question is also in the affirmative.

This answer is evident when consideration is given to the above quoted portion of Section 8, and to Section 13, of said act, supra, where it provides as follows:

"In all cases tried in said court, the same fees shall be taxed and collected by the clerk as are now allowed or may hereafter be allowed by law in the county courts of Alabama. except as herein otherwise provided."

Therefore, it is my opinion that when the judge takes an affidavit and issues a warrant in a criminal case and in bastardy proceedings, he is entitled to the fees allowed justices of the peace in such cases. All other costs incident to the case shall be the same as are taxable in the county courts of the State under the general law. Therefore, the judge of the Jefferson County Court of Misdemeanors would be entitled to seventy-five cents for taking affidavit and issuing warrant in criminal cases, and in bastardy proceedings he would be entitled to one dollar and fifty cents as provided by the Code of 1940, Title 11, Section 96, supra, which section provides the fees of justices of the peace and those fees pertinent here are as follows:

"For complaint made before him	$ .25
For issuing warrant of arrest	.50
For issuing a warrant in bastardy proceedings	1.00
For taking examination in bastardy proceedings	.50"

In answering your fourth question, it is necessary to consider a different schedule of fees. Here the question applies to the fees of the clerk of the Jefferson County Court of Misdemeanors as he performs the duty of entering

judgment and sentence. You will note that the Code of 1940, Title 11, Section 87 (Code of 1923, Section 3758), sets out the fees chargeable in the county courts of Alabama, and provides, among other things, as follows:

> "The clerk of the circuit court who by law shall be made ex officio clerk of the county court shall receive the same fees as are now allowed by law for similar services performed in the circuit court."

Of course, this applies directly to the clerk of the county court organized under general law, but, as shown above, the clerk of the Jefferson County Court of Misdemeanors, by the act creating this court, is entitled to the same fees as are now charged in the county court. The proviso, which makes the clerk of the circuit court ex officio clerk of the county court and provides that he shall receive the same fees when performing the same services in the county court as he is now allowed in the circuit court, gives the clerk of the Jefferson County Court of Misdemeanors the power and the right to collect the same fees. The schedule of fees allowed circuit clerks is found in the Code of 1940, Title 11, Section 89 (Code of 1923, Section 3739). Here, I find the following provisions:

"Entering judgment as to each defendant ..... $ .25

Entering sentence against each defendant ..... .25"

So, in misdemeanor cases where the defendant is convicted and pays the fine and costs, the fee of the clerk would be twenty-five cents, as set out above. However, if the defendant is convicted and sentenced to hard labor, the clerk's fees would be twenty-five cents for entering judgment and for entering sentence against each defendant he would be entitled to an additional fee of twenty-five cents, as set out above.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 23, 1941.

Hon. James H. Tompkins,
Solicitor, Eleventh Judicial Circuit,
Colbert County,
Tuscumbia, Alabama.

Intoxicating liquors — Commerce —

1. Under facts stated, transportation of intoxicating liquors held to be interstate commerce from Cairo, Illinois, through Alabama, to Biloxi, Mississippi.

2. Provisions of the statutory law of this state in regard to the transportation of intoxicating liquors, and the confiscation or con-

demnation of intoxicating liquors being illegally transported and the vehicle transporting same, held not applicable to interstate transportation of intoxicating liquors through the State of Alabama from one state to another, in view of the commerce clause of the Constitution of the United States, notwithstanding the provisions of Section 2 of the Twenty-first Amendment to the Constitution of the United States.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Under date of June 9, 1941, you requested my official opinion as to whether or not Cecil Combs and O. C. Brister were guilty of illegally transporting intoxicating liquors in Lauderdale County, Alabama, (a dry county); and, if so, whether or not the intoxicating liquors being so transported by them, and the truck in which the same were being transported, would be subject to confiscation or condemnation, and the procedure to be followed in the confiscation or condemnation thereof, in case I should hold that the same should be confiscated or condemned. The material facts, as gathered from your letter of inquiry, and other information made available to me, may be summarized as follows:

On June 2, 1941, a truck owned by one Grover Graham of Biloxi, Mississippi, and bearing Mississippi license tags or plates, and loaded with intoxicating liquors (whiskey), was wrecked in Lauderdale County, Alabama. The truck was being operated by Cecil Combs and O. C. Brister, employees or agents of the said Graham. The whiskey had been purchased by the said Graham in Cairo, Illinois, and at the time of the wreck was being transported in his own truck, through Alabama and Lauderdale County, to Biloxi Mississippi, in violation of the laws of that state, by his employees or agents, Combs and Brister. As a result of the wreck, some of the bottles of whiskey and some of the cases of whiskey were broken. After the wreck a second truck was called from Memphis, Tennessee, for the purpose of taking the whiskey on to Biloxi, Mississippi, the truck involved in the wreck being disabled. While the whiskey was being transferred from the wrecked truck to the truck called out from Memphis, Tennessee, for the purpose of taking the whiskey on to Biloxi, Mississippi, the whiskey and the wrecked truck were seized by the sheriff of Lauderdale County, and charges of illegally transporting intoxicating liquors were preferred against the said Combs and Brister. Officers of the Alabama State Highway Patrol were present at the scene of the wreck, and the said Combs and Brister endeavored to give some of the whiskey to these officers for their personal use, throwing one or two bottles of the same into the officers' car. Had it not been for the wreck, the whiskey would have been transported in continuous passage through the State of Alabama to Biloxi, Mississippi, and it was the intention of the said Combs and Brister, after the wreck, to reload the whiskey on the truck called out from Memphis, Tennessee, and resume the transportation of the same through Alabama to Biloxi, Mississippi, as soon as possible. It does not appear that there was any intention on the part of said Grover Graham, the owner of said whiskey, to make, or have made, any illegal sale or disposition of any of said whiskey in Lauderdale County or the State of Alabama, it appearing, on the contrary, that his intention in the premises was only to transport, or have transported, the said whiskey from Cairo, Illinois, through the State of Alabama, to Biloxi, Mississippi.

The first question that presents itself is whether or not, under these facts and circumstances, this whiskey was being transported from Cairo, Illinois, through the State of Alabama, to Biloxi, Mississippi, in interstate commerce.

In **15 C. J. S. 258, Section 2,** interstate commerce is defined as:

"The free interchange of commodities between citizens of different states, without regard to state line, and it must be such as takes place between states as differentiated from commerce wholly within a state."

Thus, it can be seen that the transportation of this whiskey was interstate commerce, unless the temporary stoppage of the same in Alabama, as a direct result of the wreck of the truck on which the same was being transported, and the subsequent actions in regard thereto, operated to divest it of its interstate character.

The following statements from 15 C. J. S. beginning on page 290, Section 25, suffice to show that the temporary stoppage in Alabama, under the facts stated, did not operate to change its interstate character:

"§25. Beginning, Continuance and Termination of Transportation.

"In general commerce begins when the movement of the product begins, and ends when the product comes to rest at its destination; nor is the interstate or intra-state character of the commerce affected by temporary breaks in the transportation at intermediate points which are necessary or convenient to the promotion of further transportation.

"Commerce begins when the movement of a product is actually begun.

* * *

"When once acquired, the impress of interstate commerce is not removed until the completion of the service by the last movement, *** .

"An interstate shipment is not divested of its interstate character or subjected to the control of the local authorities by a temporary break in the transportation at an intermediate point caused by matters beyond the control of the consignee, or to serve some necessity or convenience of further transportation; *** ."

It is further my opinion that the actions of the employees or agents of the owner of the whiskey, in attempting to give some of it to the officers of the Alabama State Highway Patrol for their own personal use, does not operate to divest the transportation of this whiskey of its interstate character, since it does not appear that in so acting, they were acting within the scope of their authority. The rule in this regard is stated as follows in **2 C. J. S. 1183, Section 91:**

" *** A transaction outside of the scope of the agent's authority, actual or apparent, in any view of his agency, is incapable of affecting the rights, liabilities, or relations of the principal, and is the agent's act exclusively, *** ."

Having determined that the transportation of this whiskey, under the particular facts and circumstances, was interstate commerce from Cairo, Illinois, through the State of Alabama, to Biloxi, Mississippi, the question then presents itself as to whether or not it was subject to regulation by the State of Alabama, in view of Section 2 of the Twenty-first Amendment to the Constitution of the United States, which amendment repealed the Eighteenth Amendment, or whether or not it was protected therefrom by the commerce clause of the Constitution of the United States. Article 1, Section 8, Clause 3.

Section 2 of the Twenty-first Amendment, supra, reads as follows:

> "Section 2. The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

It has been repeatedly held by the Supreme Court of the United States that the effect of this section is to remove intoxicating liquors from the protection of the commerce clause, insofar as their importation into a state for delivery or use therein, in violation of the laws thereof, is concerned. See **State Board of Equalization of California v. Young's Market Co.**, 299 U. S. 59; **Mahoney v. Joseph Triner Corp.**, 304 U. S. 401; **Collins v. Yosemite Park and Curry Co.**, 304 U. S. 518; **Indianapolis Brewing Co. v. Liquor Control Commission**, 305 U. S. 391; **Joseph S. Finch & Co. v. McKittrick**, 305 U. S. 395; **Ziffrin v. Reeves**, 308 U. S. 132.

However, the Supreme Court of the United States, so far as my research discloses, has not considered the question of whether or not, under this section, a state may regulate the interstate passage of intoxicating liquors through that state to another state. It did consider and decide an analogous question in the case of **Collins v. Yosemite Park and Curry Co.**, supra. In that case, one of the questions under consideration was whether or not the regulatory provisions of the statutes of the State of California in regard to intoxicating liquors operated upon shipments of intoxicating liquors from another state to the Yosemite National Park, a federal reservation in the State of California. In holding that they did not, the court spoke, as pertinent, as follows:

> "XXI Amendment. The State makes the point that §2 of the XXI Amendment gives it the right to regulate the importation of intoxicating liquors. Reliance for enforcement is placed upon §§49 and 49.2 of the Alcoholic Beverage Control Act. The argument for this claim is bottomed upon our decision in State Board of Equalization v. Young's Market Co., 299 U. S. 59, where we held that a statute imposing a $500 license fee for importing and a $750 license fee for brewing beer did not violate the commerce clause or the equal protection clause, because the words of the XXI Amendment 'are apt to confer upon the State the power to forbid all importations' and 'the State may adopt a lesser degree of regulation than total prohibition' (pp. 62, 63). The lower court was of the opinion that though the Amendment may have increased 'the state's power to deal with the problem . . . , it did not increase its jurisdiction.' With this conclusion, we agree. As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into Cali-

fornia 'for delivery or use therein.' The delivery and use is in the Park, and under a distinct sovereignty. Where exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable."

Paraphrasing the language of the court there, I think it might be said of the instant situation: As territorial jurisdiction over the State of Mississippi is in the State of Mississippi and the United States, the State of Alabama cannot legislate for the area merely on account of the Twenty-first Amendment. There was no transportation into Alabama "for delivery or use therein." The delivery and use is to be made in the State of Mississippi, a separate and distinct sovereignty from the State of Alabama.

Some of the state courts have spoken directly to this question. The Supreme Court of Appeals of Virginia in an able and exhaustive opinion in the case of **Williams v. Commonwealth,** 192 S. E. 795, where the history of federal action on the subject, both constitutional and statutory, was reviewed, held that, even under Section 2 of the Twenty-first Amendment, supra, the provisions of a statute of that state requiring permits and the posting of a bond for interstate shipments of intoxicating liquors, not to be delivered or used in Virginia, but only passing through that state in interstate commerce, destined for some other state, constituted direct burdens upon interstate commerce, prohibited by the commerce clause. This position was reaffirmed in the case of **Surles v. Commonwealth,** 200 S. E. 636, in which the Supreme Court of Appeals of Virginia condemned another provision of the statutory law of that state in regard to intoxicating liquors (requiring a designation of the route to be travelled in transporting same) as violative of the commerce clause of the federal constitution, when applied to interstate shipments of intoxicating liquors through that state from one state to another.

This is also the view of the Supreme Court of Tennessee, as expressed in the case of **McCanless v. Graham,** 146 S. W. (2d) 137, wherein it was held that intoxicating liquors loaded on trucks in Illinois, and transported across Tennessee without unloading or stopping, for purpose of being sold in Mississippi in violation of the statutes of that state, was not subject to seizure under the statute of that state permitting the seizure of contraband intoxicating liquors, since that statute applied only to control of traffic in intoxicating liquors in the state, and would contravene the commerce clause of the Constitution of the United States, if it permitted seizure of intoxicating liquors which was in interstate commerce, and which retained that character until it actually entered the State of Mississippi in violation of its laws. From the identity of names and places of origin and destination, it would seem that the owner of the whiskey involved in the Tennessee case is the same man as the owner of the whiskey instantly involved.

State courts which seem to take a contrary view are the courts of Pennsylvania and Arkansas. In the case of **Commonwealth v. One Dodge Motor Truck,** 191 Atl. 590, the Supreme Court of Pennsylvania held the statutory provisions of that state regulating the transportation of intoxicating liquors to be applicable to an interstate shipment of intoxicating liquors originating in the State of Kentucky, but transshipped in Pennsylvania to the State of Maryland. However, in the opinion in that case, the court made the following statement:

"It is settled that where commodities are in fact destined from one state to another a mere rebilling or reshipment does not of itself break the continuity of the movement. Carson Petroleum Co. v. Vial, 279 U. S. 95, 103, 49, S. Ct. 292, 294, 73 L. Ed. 626; Western Oil Refining Co. v. Lipscomb, 244 U. S. 346, 349, 37 S. Ct. 623, 61 L. Ed. 1181."

The Supreme Court of Arkansas in the cases of **Jones v. State**, 129 S. W. (2d) 249, and **Duckworth v. State**, 148 S. W. (2d) 656, held that the statutory provisions of that state requiring a person to secure a permit before transporting intoxicating liquors into the state were applicable to the transportation of intoxicating liquors in interstate commerce from one state, through the State of Arkansas, to another state. However, in each of those cases, the court held that intoxicating liquors so transported through the State of Arkansas, without a permit for the transportation thereof having first been secured, were not subject to confiscation.

The effect of the decisions on this question is summarized as follows in **15 C. J. S. 452, Section 99:**

" *** As noted supra §6, the Twenty-first Amendment limits and qualifies the commerce clause of the constitution; and while it does not entirely remove intoxicating liquors from the protection of the commerce clause, it does have this effect as to their importation into a state in violation of its laws. In view of this amendment, or both the amendment and the Webb-Kenyon Act, many state laws pertaining to intoxicating liquors have been held not invalid as violating the commerce clause of the federal constitution. **However, the amendment recognizes no right in the state to enact laws concerning liquor shipped through the state; and a state law is invalid as imposing a direct burden on interstate commerce to the extent that it applies to interstate shipments through the state of liquors not to be delivered or used therein.** *** " (Emphasis supplied)

I am convinced that this summary is correct. In other words, it is my opinion that Section 2 of the Twenty-first Amendment, supra, does not recognize the right of a state to enact laws concerning intoxicating liquors shipped through the state, and that a state law is invalid, as imposing a direct burden on interstate commerce, to the extent that it applies to interstate shipments through the state of intoxicating liquors not to be delivered or used therein.

In this view, it becomes necessary to consider whether or not the statutory provisions of this state in regard to the transportation of intoxicating liquors, and in regard to the confiscation or condemnation of such liquors illegally transported and the vehicle transporting same, were intended to apply to interstate shipments such as the one here under consideration, because of the provisions of **Code of Alabama, 1940, Title 29, Section 186**, which reads as follows:

"§186. Construction of laws as to interstate shipment of liquors or beverages. — The provisions of this article in respect to the transportation of prohibited liquors into the state, shall not apply to shipments transported by any railroad company or other common carrier of unbroken packages in sealed cars or vehicles in continuous transit through

the state from one point outside of the state to another point outside of the state; but this article shall be construed to prohibit any person, firm or corporation from bringing into it or transporting through this state any prohibited liquors or beverages except as provided by law."

This for the reason that, even if it be contended that it was the intention of this section that our statutory provisions in regard to the transportation of intoxicating liquors, and for the confiscation or condemnation of such liquors illegally transported and the vehicle transporting same, were to apply to interstate shipments, such as the one in the instant case, it would be unconstitutional as violative of the commerce clause of the Constitution of the United States.

This view finds support in the case of **Hill v. State,** 27 Ala. App. 573, 176 So. 805, cer. den. 235 Ala. 8, 176 So. 806, decided after the Twenty-first Amendment became effective. The defendant in that case was indicted for, and convicted of, the offense of transporting "in quantities of five gallons or more any of the liquors or beverages the sale, possession or transportation of which is *** prohibited by law," in violation of the provisions of our statutory law which now appears as Code of Alabama, 1940, Title 29, Section 187. I quote from the opinion of the Court of Appeals, as pertinent, as follows:

"Appellant was apprehended on a main highway in DeKalb county, Ala., driving an automobile containing about 100 gallons of whiskey in sealed bottles and jugs, most of which were in cases but some loose in the car. It was all bonded whiskey.

"Appellant admitted the possession of the whiskey, but contended he was en route from Somerset, Ky., to Jacksonville, Fla., with it; and offered some evidence to that effect — it being his contention that the whiskey was an interstate shipment, originating in Kentucky, and destined to no point in Alabama.

* * *

"We are of the opinion expressed by the Supreme Court in the case of Moragne v. State, 200 Ala. 689, 77 So. 322, L. R. A. 1918E, 948, that 'our state statute(s) (instantly, Gen. Acts Ala. 1927, pp. 704, 705) do(es) not apply, and were (was) never intended to be applied, to *** an interstate carrying or possession of such goods for the sole purpose of interstate transportation.'

"Of course, 'interstate transportation' may be 'by automobile and over the public highways' as well as by any other method. Moragne v. State, 201 Ala. 388, 78 So. 450, 451. And see U. S. v. Simpson, 252 U. S. 465, 40 S. Ct. 364, 64 L. Ed. 665, 10 A. L. R. 510.

"If, indeed, appellant did have the whiskey in possession merely in 'interstate commerce,' he should have been acquitted. Authorities hereinabove cited."

This, in spite of the fact, as shown by the official report of the case, that the State of Alabama, through the Attorney General, argued, that a different conclusion should have been reached, in view of the provision of Section 4717 of the Code of Alabama, 1923, the forerunner of Code of Alabama, 1940, Title 29, Section 186, supra.

The premises considered, it is my opinion that the said Combs and Brister are not guilty of illegally transporting intoxicating liquors through Lauderdale County and the State of Alabama, and that the whiskey being transported by them and the truck on which the same was being transported, should not be confiscated or condemned, but should be released to the owner thereof for such further disposition as he sees fit to make of the same, not in conflict with the laws of the State of Alabama.

In view of what has been said hereinabove, it becomes unnecessary to answer your inquiry as to what procedure should be followed in the confiscation or condemnation of this whiskey.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 26, 1941.

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Judge of Probate — Adoption — Fees —

Judge of Probate may not charge for sending notice to the State Department of Public Welfare of action taken on final adoption or of revocation or annulment of adoption; nor may charge be made for copies of reports of adoption and reports of revocation or annulment of adoption mailed to the Registrar of Vital Statistics of the Department of Health. Code 1940, Tit. 27, §4.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

I have your letter of June 21, 1941, in which you request my official opinion as follows:

"I would appreciate your advice upon the following questions, to-wit:

"In an opinion by the Attorney General dated April 4, 1935, addressed to the Hon. G. H. Howard, Biennial Report Attorney General Alabama

Oct. 1, 1934-Sept. 30, 1936, the Attorney General's office sets out the fee to be charged for services in an adoption case; the law requires that a copy of the Interlocutory Order of Court be forwarded to the State Child Welfare Department of Alabama, and that a copy of the Final Decree together with Notification of Final Order in an adoption case be forwarded to the State Child Welfare Department of Alabama and to the State Registrar of Vital Statistics, State Department of Health of Alabama, and I would appreciate being advised if this sworn or certified copy is a proper charge against the petitioners, as in other probate cases where certified copies of the record are made."

In my opinion, there is no provision of law authorizing a charge against a petitioner in an adoption proceeding of any fee for the services rendered by the Judge of Probate in notifying the State Department of Public Welfare and the registrar of Vital Statistics of the State Health Department of action taken in the adoption proceeding, as required by Code 1940, Tit. 27, §4.

You will observe that said Section 4 of Tit. 27 requires only the following:

"Upon the entry of a final order of adoption the judge or the clerk of the court shall notify the state department of public welfare of the action taken, giving the names and addresses of the natural parents, if known, or of the child's next of kin, the age and name of such child before and after adoption, and the names and addresses of the foster-parents. Said department shall likewise be notified of any subsequent revocation of such order of adoption or of any annulment of adoption. Copies of all reports of adoptions and reports of revocations of order of adoption and of annulments shall be mailed to the registrar of vital statistics of the department of health."

It is not necessary, under the foregoing section, that **certified** copies of any record be forwarded the departments named. No fee is provided in Section 4, or elsewhere in Title 27, for the services required. It was evidently the legislative judgment that the fee of one dollar for "Service rendered in legitimatizing and adopting children under the provisions of this Code" allowed to judges of probate by Code 1940, Title 11, §29, was sufficient compensation for these services.

You will also observe that in Section 1 of Tit. 11, it is provided:

"The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

Your attention is called to the copious annotations following this section, and particularly to the case of **Troup v. Morgan County, 109** Ala. 162, 19 So. 503, for statements of the Appellate Courts and of this office relative to the purpose, scope and effect of this provision.

The opinion to Judge Howard (Biennial Report of Attorney General, 1934-36, page 127), to which you refer in your letter of inquiry, furnishes no authority for permitting the collection of the fees concerning which you in-

quire. The Howard opinion merely holds that the judge of probate is entitled to the fee of one dollar for his services rendered in adoption cases, and, in addition thereto — since it is required that the petition and all decrees be recorded — he is entitled to the fees provided for the services rendered in connection with such recordations. The Howard opinion is here reaffirmed.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 26, 1941.

Hon. Holt. A. McDowell,
Sheriff, Jefferson County,
Court House,
Birmingham, Alabama.

SHERIFFS —

1. Sheriffs are entitled to full commissions on legal sales under execution on a money judgment.

2. Amount of commission is based on the purchase price at the sale.

3. Sheriffs are entitled to these commissions although the purchaser was the plaintiff judgment creditor and credited the amount on the judgment.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your letter of June 20, 1941, in which you request an official opinion, is as follows:

"At your very earliest convenience will you please give me the benefit of your opinion on the following question:

"A judgment creditor has execution issued and a levy is made by me on real property. The property is duly advertised for sale and on sale date is purchased by the judgment creditor as a credit on judgment. No cash money actually is passed.

"Am I, as sheriff, entitled to commissions arising from the sale when property is purchased by a judgment creditor as a credit on judgment?

"This enquiry pretermits the question of my costs as to advertising fees etc., but is directed only to the commission feature."

Your question involves a consideration of Sections 34 and 35, Title 11 of the Code of Alabama, 1940. Section 34, in part, provides as follows:

"Sheriffs are entitled to receive the following fees for the following services:"

Then follows the catalog of fees for various services rendered by sheriffs, among which is the following:

"Collecting money under execution: For the first two hundred dollars, five percent; for collection all sums over two hundred dollars, up to and including five hundred dollars, four percent; and for collecting all sums in excess of five hundred dollars, three percent; but no commission shall be collected on costs."

Section 35 above referred to is as follows:

"§35. Sheriff's fees, when due.—Sheriffs and coroners are not entitled to full commissions until after actual levy of execution on property of the defendant, and the money made or paid to the plaintiff in execution and then only on the amount actually collected or paid."

Much of these provisions have been in all the codifications of our laws for many years. I have made a careful search for their construction by the courts and by this office. I have been unable to find a decision on the exact question covered by your request, except the case of **Northern Alabama Railroad Co. v. Lowery,** 3 Ala. App. 511, 57 So. 260. This case involved the sheriff's commissions but went off on the ground that there was no valid levy in the case. In discussing the provisions of law now embodied in Sections 34 and 35 above mentioned, the court said:

"It is the plain purpose of the above statutes that, unless the sheriff in person, or by a deputy, actually collects money on an execution, or unless he makes an actual valid levy of an execution upon property of the defendant in execution, subject to levy and sale, he is entitled to no commissions. Section 3275, it is true, provides that when a clerk receives payment of a judgment he must collect the costs and commissions of the sheriff, if execution has issued on said judgment; but sections 3697 and 3698 clearly manifest the legislative intent that no commissions become due the sheriff until after an actual levy has been made as we have above stated."

It appears from Sections 34 and 35 of the Code of Alabama, 1940, and the above decision of the Court of Appeals that you are entitled to full commissions arising from execution sales made on valid levies and proper notice, etc., and the fact that the plaintiff, as judgment creditor in the case, became the purchaser and makes payment by giving credit on the judgment debt does not affect your rights to the full commission on the actual amount of the sale price.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 26, 1941.

Hon. F. O. McManus,
Secretary, Alabama Bridge Commission,
Montgomery, Alabama.

Alabama Bridge Commission — O'Neal Bridge —

Alabama Bridge Commission not authorized to devote funds resulting from sale of O'Neal Bridge Bonds and/or operation of O'Neal Bridge to payment of expense incurred by it in connection with another bridge project.

Opinion by Assistant Attorney General Matthews.

Dear Sir:

Your request for official opinion dated May 10, 1941 follows:

"On December 3, 1937 the Alabama Bridge Commission met in Montgomery and entered into a contract or agreement for the sale of $950,000.00 of its bonds for the construction of the O'Neal Bridge at Florence.

"The Bridge Commission at this meeting adopted an Indenture or Bond Agreement setting out in detail how the money received from the sale of Bonds and how the revenue received from operation of bridge must be handled and for what purpose spent. This Indenture contemplated no expense or expenditure other than the expense in connection with the construction and maintenance of the O'Neal Bridge and the interest and final retirement of the Bonds sold for the construction of this project.

"There have been retired eighty-two of the above mentioned bonds, and the Commission is now advertising for the call of the remaining bonds for June 1, 1941. These bonds will be retired with funds derived from General Obligation bonds sold under authority of a Constitutional Amendment, said bonds to be financed with a part of the revenue received by the State Highway Department of Alabama from tax on gasoline.

"The Alabama Bridge Commission now has a balance on deposit in the First National Bank at Florence, the largest part of which is being reserved pending result of litigation now in the Courts.

"In addition to the O'Neal Bridge, the Commission authorized and made plans and advertised for bids for the construction of a bridge near Mobile to be known as Dauphin Island Bridge, this bridge to be financed with funds to be secured from sale of bonds. An Indenture was prepared and adopted covering disposition of funds for this issue of bonds.

"On account of advance in cost of materials, labor, etc., no bids were received, as the amount of bonds authorized were insufficient to cover

cost of bridge, and the Reconstruction Finance Corporation, who were to handle the bonds, declined to authorize additional funds.

"In the meantime, the Bridge Commission has incurred considerable indebtedness, the larger part of which has been advanced by the Highway Department for engineering. However, there is a bill for printing bonds, legal expense, etc.

"Will you please advise me if the funds now in the possession of the Commission, which accumulated under the O'Neal Bridge Indenture, may be used to pay accumulated expense on Dauphin Island Bridge, there being no funds in the Dauphin Island account."

From the Minutes of a meeting of the Alabama Bridge Commission held December 3, 1937, it appears that the Commission adopted a resolution in connection with the issue of its $950,000 4½% Bridge Revenue Bonds, dated December 1, 1937 and maturing December 1, 1962, wherein it covenanted and agreed that all revenues from operation of the O'Neal Bridge, "after the expense of maintenance and operation" were pledged for payment of the bonds and interests thereon. In the resolution the Commission further covenanted to apply all such revenue to retirement and redemption of the bonds.

In Section 5 of the resolution it is expressly stipulated that no payment may be made out of the Revenue Fund (composed of tolls from operation of the bridge) unless authorized by the Chairman and Secretary of the Commission and certified to be a **"payment necessary for the maintenance, repair or operation of the bridge,"** or to be for interest on the bonds or for the purchase or redemption of such bonds.

It would seem, therefore, too clear for argument that so long as any of said bonds and the interest coupons thereon are outstanding and unpaid the Commission is without authority to divert any part of the so-called Revenue Fund to payment of expenses or liabilities incurred by it otherwise than in the operation, maintenance and repair of the O'Neal Bridge. Payments from the Revenue Fund are absolutely limited to the expense of operation, etc., of the O'Neal Bridge and to payment, redemption and retirement of the O'Neal Bridge bonds and interest thereon.

It is true that under the 42nd Amendment to the Alabama Constitution provision has been made to retire these bonds, and, I am informed, more refunding bonds have been sold, and a larger fund thereby acquired, than necessary for that purpose. That fact does not, however, in my opinion, change the conclusion above stated as to the restricted use of all funds held by the Commission as revenues from the O'Neal Bridge.

When all original outstanding O'Neal Bridge bonds have been retired and all expenses charged against operation, etc., of the bridge have been paid, whatever balance of O'Neal funds may remain should be applied to payment of interest and principal of the bonds authorized to be issued under the 42nd constitutional amendment, supra, under the familiar doctrine of equitable subrogation.

The powers and authority of the Bridge Commission are strictly limited; it is a mere agency or instrumentality or the State, engaged in the exercise of governmental functions; and in the absence of express statutory authority it cannot divert funds to unauthorized uses. In Section 4 of the Act creating the Commission (General Acts, 1935, pages 94, 97), it is expressly provided that "there shall be a separate issue of bonds for each project undertaken by the Commission as authorized by this Act. Said bonds shall be authorized by resolution of such Commission," etc.

I find no authority in the Act whereby the Commission may intermingle the funds belonging to one project with funds from another project, or divert funds belonging to one project for the benefit of another project. The plain intent of the act is that each project must stand on its own bottom.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 26, 1941.

Hon. A. H. Collins,
Superintendent of Education,
State of Alabama,
Montgomery, Alabama.

Schools and School Districts — State Board of Education — Bonds Constitutional Law — Words and Phrases — Erection —

The State Board of Education has authority, under Act No. 497, S. 406, approved September 13, 1935 (General Acts, 1935, page 1064), as the title and Section 1 thereof were amended by Act No. 6, H. 26, approved March 29, 1939 (General Acts, Special Session, 1939, page 5), to issue and sell bonds, bearing interest not exceeding four percent, for the purpose of securing funds with which to erect a student dormitory at the Agricultural and Mechanical Institute at Normal, Alabama, such bonds to be payable solely from the revenue derived from the operation of said dormitory, and secured by a pledge of such revenue, notwithstanding the fact that in the construction of said dormitory, the walls, or a part of them, of an old brick building located on a site owned by the State Board of Education in the name of said institution, which building is no longer being used for institutional purposes, because unsuitable therefor, will be used.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

Your request for official opinion bearing date of May 14, 1941, is as follows:

"The State Board of Education desires to issue and sell college revenue bonds under the provisions of Act No. 497, approved September 13, 1935, REGULAR SESSION OF 1935, as amended by Act No. 6, approved March 29, 1939, SPECIAL SESSION OF 1939, said bonds to be issued by the State Board of Education in the name of the Agricultural and Mechanical Institute at Normal, Alabama, for the purpose of erecting a college dormitory building. The following is a description of the proposed erection project:

"1. The dormitory is to be constructed in cooperation with the National Youth Administration for the purpose of housing 100 college students.

"2. The erection plan is as follows:

"An old brick building is located on the site owned by the State Board of Education in the name of the Agricultural and Mechanical Institute, which building is no longer being used for college purposes. Its use has been abandoned because of the improper arrangement of the interior of the building. The State Board of Education is faced with the alternative of either wrecking the old building completely and rebuilding it from the ground up or saving the walls and rebuilding completely the interior. Architects employed by the State Board of Education have advised that it is more economical to follow the latter alternative; that is, retain the walls and rebuild the interior.

"Therefore, the State Board of Education desires to rebuild entirely the interior walls, floors, and partitions; install fireproof stairways and fire escapes; and install a new heating and plumbing system. The plan is to entirely reconstruct the building with the exception of a part of the outer walls. The building is not now being used as a dormitory and it is not now an asset to the college any more than a pile of bricks. If the building is reconstructed as planned, it will become an asset to the college and have value as a revenue-producing project.

"Section 1 of Act No. 497 provides as follows:

> " 'That authority is hereby granted to the State Board of Education and/or the trustees of all State Institutions respectively, where education is a part of the program of the Institution, to borrow money from Federal Agencies for the erection of buildings, beautification of grounds, and the erection and maintenance of swimming pools at the several State Institutions, and to comply with the requirements of such Federal Agencies promulgated in reference to moneys so loaned.'

"Your opinion is requested on the following question: Does the State Board of Education have the authority to issue and sell college building revenue bonds in the name of the Agricultural and Mechanical Institute at Normal, Alabama, for the purpose of erecting the student dormitory described above?"

You have informed me that the bonds which the State Board of Education desires to sell for the purpose of securing the necessary funds with which to construct the student dormitory at the Agricultural and Mechanical Institute at Normal, Alabama, in the manner described in your letter of inquiry, will be payable solely from the revenue derived from the operation of said dormitory, and that they will be secured by a pledge of such revenue.

In my opinion, your inquiry should be answered in the affirmative. In other words, it is my opinion that the State Board of Education has the authority, under Act No. 497, S. 406, approved September 13, 1935 (General Acts, 1935, page 1064), as the title and Section 1 thereof were amended by Act No. 6, H. 26, approved March 29, 1939 (General Acts, Special Session, 1939, page 5), to issue and sell bonds, bearing interest not exceeding four percent, for the purpose of securing funds with which to erect a student dormitory at the Agricultural and Mechanical Institute at Normal, Alabama, such bonds to be payable solely from the revenue derived from the operation of said dormitory, and secured by a pledge of such revenue, notwithstanding the fact that, in the construction of said dormitory, the walls, or a part of them, of an old brick building located on a site owned by the State Board of Education, in the name of said institution, which building is no longer being used for institutional purposes, because unsuitable therefor, will be used.

The State Board of Education has the direction and control of the Agricultural and Mechanical Institute at Normal, Alabama. (See Sections 494-495 of the Alabama School Code of 1927.)

Section 1 of Act No. 497, as amended by Act No. 6, supra, provides as follows:

> "Section 1. That authority is hereby granted to the State Board of Education and/or the trustees of all State Institutions, respectively, where education is a part of the program of the Institution to borrow money from Federal agencies or from private person or corporation or lending agency for the erection of buildings, beautification of grounds and the erection and maintenance of swimming pools at the several State Institutions and to comply with the requirements of such Federal agencies or of such private persons, or corporations, or lending agencies promulgated in reference to moneys so loaned."

It might be argued that, since the walls, or a part of them, of an old brick building located on a site owned by the State Board of Education, in the name of the Agricultural and Mechanical Institute at Normal, Alabama, which building is no longer being used for institutional purposes, because unsuitable therefor, are to be used in the construction of this student dormitory, that this procedure would not constitute the "erection" of a building, within the meaning of Section 1, as amended, supra, but rather, that it would constitute the alteration or repair of an existing building, not within the purview of said Section, as amended, supra. However, I do not believe this argument to be tenable.

In my opinion, such a procedure would constitute the "erection" of a building within the purview of said Section, as amended, supra. My research has not disclosed a decision of the appellate courts of this state on

such a question, but the Supreme Court of Texas, in the case of **Brown v. Graham,** 58 Tex. 254, has considered a very similar question, and the language of the Court is so apposite that the pertinent portion of the opinion is here quoted:

> "It is no more than a reasonable construction of language, to hold that power to erect an entire building expressly authorizes the construction of a portion of it. It certainly does by necessary implication.
>
> "Should the commissioners' court come to the conclusion that a larger court house is needed to meet the demands of the public business of their county, and they agree upon its plan and dimensions, and find that they can secure a building conforming to them in every respect, either by erecting a new structure, or altering, repairing and enlarging the old one, and that the latter mode will be less expensive by half than the former, is there any reason in holding that they can levy the tax for the more expensive mode of attaining their object, when they could not for the other, though the structure which is the result is precisely the same in every particular?
>
> "The object of the foregoing provisions of our constitution and statutes was to enable the different counties to provide suitable public edifices, leaving it to the judgment of the proper authorities whether this should be done by building new houses or by repairing and adding to the old ones, when they could thus be rendered suitable to the purposes of the county. The word 'erect' contained in all the foregoing provisions, was the most comprehensive term that could be used to embrace all such improvements.
>
> "To hold that a county whose court house, with proper repairs and additions, could be rendered commodious and useful in every respect, must pull it down and build an entirely new one, would be to charge our law-givers with an intent to encourage an unnecessary expenditure of the public money. Such a consideration would not, in itself, authorize us to infer a power when not expressly given or necessarily implied. Yet when the language used is capable of including authority to do an act not mentioned in terms, such construction of it is greatly aided by considerations of public advantage which it would certainly produce."

Applying the logic and reasoning of the Supreme Court of Texas to the instant situation, it is my opinion that the construction of a student dormitory at the Agricultural and Mechanical Institute at Normal, Alabama, according to the procedure outlined in your letter of inquiry, would constitute the "erection" of a building, within the purview of Section 1, as amended, supra.

Having decided that the construction of this student dormitory, according to the procedure outlined in your letter of inquiry, constitutes the "erection" of a building within the purview of Section 1, as amended, supra, it is my opinion that Act No. 497, supra, as amended by Act No. 6, supra, contains express authority for the State Board of Education to issue and sell bonds, bearing interest not exceeding four percent, for the purpose of securing funds with which to construct said dormitory, said bonds to be payable solely from the revenue to be derived from the operation of said dormitory, and secured

by a pledge of such revenue. This position is fully sustained by the decision of the Supreme Court of Alabama in the case of **Keller v. State Board of Education of Alabama,** 236 Ala. 400, 183 So. 268. In that case, the Court had before it for consideration the question of whether or not the State Board of Education had the authority, under Act No. 497, as originally enacted, supra, to issue and sell bonds or warrants, bearing interest not to exceed four percent, for the purpose of securing funds with which to construct a physical education building and swimming pool at the State Teachers' College at Florence, Alabama, said bonds or warrants to be repaid from the gross revenues accruing from the operation of the physical education building and swimming pool to be constructed on the campus of said institution, by the use of such funds. (The change made in Act No. 497, supra, by Act No. 6, supra, is not material to the instant inquiry.)

In upholding the authority of the State Board of Education to issue and sell such bonds, the Supreme Court, in an able and exhaustive opinion by Mr. Justice Thomas, said in part:

> "The special obligation bonds authorized by the governing board of the educational institutions of the State of Alabama which are to be payable solely from revenue derived from the operation of the project constructed from the proceeds of such bonds, are not debts of the governing board, the college or the State of Alabama within the meaning of any constitutional or statutory limitations. Harman v. Alabama College, 235 Ala. 148, 177 So. 747; 10 A. L. R. 900; Miller v. City of Buhl, 48 Idaho 668, 284 P. 843, 72 A. L. R. 687; Bankhead v. Town of Sulligent, 229 Ala. 45, 155 So. 869, 96 A. L. R. 1385. Many authorities from other jurisdictions are to like effect, as will be considered later.
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> * * * * * *
>
> "Is the proposed bond issue and resolution providing for its amortization within the inhibition of any statutory or constitutional provision? We have indicated that the same is not within the prohibition of the constitution. Alabama College v. Harman, 234 Ala. 446, 175 So. 394. This holding is supported by the following authorities: In re Opinions of the Justices, 226 Ala. 570, 148 So. 111; Oppenheim v. Florence, 229 Ala. 50, 155 So. 859; Alabama State Bridge Corp. v. Smith, 217 Ala. 311, 116 So. 695; Kimmons v. Jefferson County Board of Education, 204 Ala. 384, 85 So. 774; Harman v. Alabama College, 235 Ala. 148, 177 So. 747."

Would such bonds, to be repaid solely from the revenue derived from the operation of said dormitory, and secured by a pledge of the revenue derived from the operation thereof, constitute a debt inhibited by the Constitution, to wit, the walls, or a part of them, of the old building described in your letter of inquiry, is to be used in the construction of said dormitory?

In my opinion, on the basis of the decision in **Keller v. State Board of Education of Alabama,** supra, they would not. Very clearly, if no part of the old building was used, such bonds would not constitute a debt within the inhibition of the Constitution, under that decision. That being true, I do not believe it can be said that they would constitute a debt, merely because the walls, or a part of them, of this old building, no longer being used for insti-

tutional purposes, because unsuitable therefor, are salvaged and used therein, it being more economical to follow this procedure than to wreck the old building completely and construct the student dormitory form the ground up.

In reaching this conclusion, I have not overlooked the decisions of the Supreme Court of Alabama in the cases of **In re Opinions of the Justices, 226** Ala. 570, 148 So. 111; **Town of Opp v. Donaldson,** 230 Ala. 689, 163 So. 332, and other decisions of like import holding that bonds issued by a municipality for the purpose of securing funds with which to make extensions or improvements to an existing utility system owned by the municipality, said bonds to be repaid from the revenue from the entire system, as extended or improved, and secured by a pledge of the revenue from the entire system, constitute a debt within the limitations of our Constitution. Such a situation, in my opinion, is readily distinguishable from the instant situation. There, as well as pledging the revenue to be derived from extensions and improvements to the system, to secure the payment of the bonds issued and sold for the purpose of securing funds with which to make the extensions or improvements, the revenue derived from an existing system already owned by the municipality, and already being operated and producing revenue, was also pledged to secure the payment of the same. But here, the property of the institution which will be used in the construction of this dormitory, is an old building no longer being used for institutional purposes, because unsuitable therefor, and producing no revenue; and the walls, or a part of them, are merely being salvaged and used in the construction of the dormitory, because it is found to be more economical to follow this procedure than to wreck the old building completely and construct the dormitory from the ground up. Notwithstanding this fact, in my opinion, the entire revenue derived from the operation of this dormitory may be said to be "revenue derived from the operation of the project constructed from the proceeds of such bonds."

The fact that the Code of 1940 has become effective does not affect my answer to your inquiry, since Sections 494-495 of the Alabama School Code of 1927, supra, appear as Sections 452 and 453 of Title 52 thereof, and Act No. 497, supra, as amended by Act No. 6, supra, appears as Section 37 of Title 52 thereof, without change in legal effect, insofar as the instant inquiry is concerned.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 26, 1941.

Hon. Chris J. Sherlock,
State Highway Director,
Montgomery, Alabama.

Merit System — Leaves of Absence —

Highway employees temporarily assigned to Federal projects upon order of appointing authority, and paid by Federal agency, held legally entitled to earned vacation and accrued sick leave.

Opinion by Assistant Attorney General Loeb.

Dear Sir:

Your letter of May 30, 1941, in which you request an official opinion, is as follows:

"Re: **Vacation and Sick Leave**

"Construction of certain projects known as Two-Way projects, in which the WPA participates with the Highway Department, necessitated the placing of certain engineering personnel of this Department on the WPA payroll to supervise construction activities, and these employees were given a leave of absence from the Highway Department.

"The purpose in doing this was the fact that the WPA participation was mainly in the payment of salaries and the furnishing of materials, and by so placing our engineers in charge of this work on their payroll, our payroll was reduced, but efficient supervision was maintained.

"The question has now arisen as to whether these men, who are actually still performing a service for the State although they are not on the State's payroll, are entitled to their accrued vacation and sick leave for the period they are on the WPA payroll. This Department wishes, if it may legally do so, to grant these men their earned vacation and permit them to retain their accrued sick leave when they return to this Department upon the completion of the projects to which they were assigned on leave of absence. Further, these men were assigned to the WPA projects upon orders from the Department Head, and it was not optional with the personnel."

It is my opinion that your Department may grant the men concerning whom you inquire their earned vacation and permit them to retain their accrued sick leave.

In reaching the foregoing conclusion, I have adopted as a guide the rule of construction, formulated from the cases and set forth in 43 Corpus Juris 608, Section 988, Note 91, as follows:

"The primary purpose of civil service laws and rules is to promote the good of the public service, and it is not to be frustrated by technical or narrow constructions."

The provisions of the Merit System Act of 1939 have been codified in the 1940 Code as Chapter 9 of Title 55. In Section 300 of Title 55 provision is made for the adoption of rules by the State Personnel Board. Among other things, it is provided that "such rules shall provide for *** leaves of absence for **employees in the state service.**"

Section 294 of Title 55 defines "state service" as including "all offices and positions of trust or employment in the service of the Alabama state govern-

ment, **irrespective of whether the remuneration or compensation** of such offices and positions of trust or employment **be paid out of the state treasury or not** *** ."

You will observe, therefore, that an employee may be in the "state service" even though he is paid directly from a private source or by a governmental agency other than the State itself, and rules relating to leaves of absence will apply with equal force and effect to him. Of consequence, the employees concerning whom you inquire should not be held to have left the State service, and to have therefore lost the benefit of the regulations relating to leaves of absence, merely because their compensation is received from a Federal agency. Nor can the fact that these employees have obtained so-called "leaves of absence" be held as indicating that they have left the State service. In Field, "Civil Service Law," at page 147, it is stated that "A leave of absence does not vacate the position."

In the present case, it seems that the employees have a peculiar and unique status. They are under the control of the appointing authority, and their employment by the Federal government is at the direction of such authority. They are subject to recall by the appointing authority, and, indeed, it would seem that, except as to their method of compensation, they are in all respects similarly situated with respect to their employment as are other State employees. Their status seems to be a form of "detached service," similar to that of an officer or employee who is temporarily loaned by the State to some other public or private agency. Moreover, a substantial saving of State funds is daily resulting from this method of employment.

Sound principles of construction will not permit a holding that these employees are deprived of the benefit of sick leave and annual leave to which they would otherwise be entitled, except for circumstances such as here exist, and over which they have no control. Such a conclusion would operate to impose an unjust penalty on these employees. You the therefore advised that the employees here in question are entitled to accrued sick leave and accrued annual leave at the same rate as other employees in the State service.

In reaching the foregoing conclusion, I have not overlooked the following provision contained in the Revised Rules of the State Personnel Board (page 31):

> "Neither annual leave nor sick leave shall accrue except when an employee is actually working or on authorized annual leave or sick leave."

It is my conclusion, however, that the employees concerning whom you inquire are "actually working" within the contemplation of the foregoing regulation.

The conclusion reached in this opinion should not be taken as indicating that every person on a leave of absence from the State service is entitled to sick leave and annual leave, for no such view is entertained, this opinion being applicable and limited to the particular facts presented.

Yours very truly,

THOMAS S. LAWSON,
Attorney General.

June 27, 1941.

Hon. John D. Petree, Director,
Department of Industrial Relations,
Montgomery, Alabama.

Department of Industrial Relations — Coal Mines —

An applicant for a coal mine foreman's certificate, under Section 61 of Title 26, Code of 1940, must have worked at a coal mine for five years, three years of which must have been spent working within the mine after the applicant has reached the age of eighteen years.

Opinion by the Attorney General.

Dear Sir:

Your letter of April 30, 1941, in which you request an official opinion, is as follows:

"I am informed by Mr. E. J. McCrossin, who is Chief of the Division of Safety and Inspection of the Department of Industrial Relations and Chairman of the Board of Examiners for applicants for mine-foreman certificates and fire-boss certificates, that the Board of Examiners has requested him to secure an opinion from your office relating to the proper interpretation and application of the phrase 'shall have had at least five years' practical experience' as it appears in Section 1636 of the Coal Mining Laws of Alabama. It seems that the particular question in mind is as to whether this phrase requires five years' practical experience in or about coal mines or is an open question and could mean five years' practical experience in any line of endeavor.

"Mr. McCrossin further directs my attention to Section 1638, Coal Mining Laws of Alabama, entitled 'Qualifications of Applicants for Fire-Boss Certificates,' in which it is stated that the applicant shall have had at least three years' practical experience within coal mines. It seems that the Board of Examiners have been under the impression in the past that the mine-foreman candidate's five years practical experience requirement must be met with experience for five years in or about coal mines.

"I would appreciate your advising me with regard to the experience requirements as set forth in Section 1636, supra, at your earliest convenience so that I may advise Mr. McCrossin and the Board of Examiners in order that they may correctly pass on the eligibility of the class of candidates for certificates now being examined."

In your letter of inquiry, you refer to Section 1636 of the Code of 1923. This section was amended by Section 18 of Act No. 193, S. 195, approved July 17, 1935 (General Acts, 1935, page 241). As amended, the provision is now incorporated in the Code of 1940 as Section 61 of Title 26. It is in words and figures as follows:

"§61. Qualification of applicants for mine foremen's certificates.— Applicants for mine foreman certificates shall be at least twenty-three years of age, and shall have had at least five years' practical experience, three years of which shall have been spent within coal mines after having attained the age of eighteen years, and shall be citizens of the United States, and shall present an affidavit as to the above and a certificate of good moral character and of known temperate habits, signed by ten reputable citizens."

It is my opinion that an applicant for a coal mine foreman's certificate must have had practical experience in or around a coal mine for a period of five years, three years of which must have been spent within coal mines after the applicant has attained the age of eighteen years.

In other words, the phrase "five years of practical experience" refers to five years of practical experience **in coal mine operations** and not in other lines of endeavor.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 27, 1941.

Hon. F. R. Albritton, Judge,
County Court, Wilcox County,
Camden, Alabama.

Wilcox County — Right of Way — Court of County Commissioners — General Fund — Gasoline Fund — Local Acts, 1939 —

1. The Court of County Commissioners may pay for right of way for a public road either out of the general fund or the gasoline fund of the county.

2. Section 20 of Act No. 436, S. 397, approved September 13, 1939 (Local Acts, 1939, page 261), construed in regard to the abolishment of the Board of Revenue of Wilcox County.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your letter of June 20, 1941, in which you request an official opinion, is as follows:

"Please give us your opinion as to the following questions:

"1. Should the Court of County Commissioners of Wilcox County, Alabama, pay for right-of-way for a public road out of the General Fund or the Gasoline Fund of said County?

"2. Under section 20 of Senate Bill No. 397, General Acts of 1939, it is provided that 'an act to establish a Board of Revenue for Wilcox County, and for the abolishment of the Court of County Commissioners of said County approved February 2, 1937, is hereby expressly repealed, Etc. etc.' Section 21 of said Senate bill goes further and sets out certain provisions as to the election of associate members and to repeal of the act approved February 2, 1937, and their effective date. Do you construe section 20 of said act to have abolished our Court of County Commissioners entirely as of the 13th day of September, 1939, when the aforesaid bill was approved? Did we have a governing body as of September 13, 1939? Our principal reason for wanting your construction of the above two sections is the fact that we issued a $227,000.00 bond issue on July 15, 1940, and we want to know if these bonds are valid. Please advise."

In answer to your first inquiry, you are advised that the Court of County Commissioners of Wilcox County, in its discretion, may pay for right-of-ways for public roads of the county either out of the general fund of the county or the gasoline fund of the county.

This office has heretofore ruled in an opinion to Hon. Henry Nash, Treasurer, Shelby County, under date of August 3, 1936 (Biennial Report of Attorney General, 1934-36, page 763), that the county governing body was authorized to purchase right-of-ways for the use of public roads out of the general fund.

This office has likewise held on several occasions that the county governing body may pay for right-of-ways for public roads out of the gasoline fund of the county. See opinion to Hon. J. M. Money, Probate Judge of Jackson County (Biennial Report, Attorney General, 1930-32, page 1017); also Quarterly Report, Volume II, page 82.

Your second inquiry contains two questions. You first ask do I construe Section 20 of Act No. 436, S. 397, approved September 13, 1939 (Local Acts' 1939, page 261), as abolishing the Court of County Commissioners of Wilcox County entirely as of September 13, 1939, the date upon which the act was approved. My answer to this question is in the negative.

You next ask did Wilcox County have a county governing body as of September 13, 1939. My answer to this question is in the affirmative.

At first blush, after a reading of Sections 20 and 21 of Act No. 436, supra, it would appear that said act abolishes the Board of Revenue of Wilcox County created under an act approved February 2, 1937, and it would further appear that your county was without a governing body from September 13, 1939, until the first Monday after the second Tuesday in January of 1941. However, after considering other pertinent provisions of Act No. 436, supra, and the provisions of Act No. 40, H. 216, approved February 2, 1937 (Local Acts, 1936-37, Extra Session, page 24),) it will be seen that this is not the case.

Your attention is called to Section 1 of Act No. 436, supra, which reads as follows:

> "§ 1. The Court of County Commissioners of Wilcox County shall be composed of five members consisting of the Judge of Probate as Chairman and four associate members. This act shall not abolish the Court of County Commissioners as set up by the 1923 Code of Alabama but shall make changes in that body and in its manner of transacting business. All laws, general and special, defining the power, rights, jurisdiction and duties of the Court of County Commissioners of Wilcox County which are not in conflict with the provisions of this law shall remain in full force and effect."

It will be seen from the express provisions of the above quoted section that this act does not abolish the Court of County Commissioners of Wilcox County as set up by the pertinent provisions of the Code of Alabama, 1923, but on the contrary, the Court of County Commissioners is expressly preserved.

Act No. 40, supra, which is the act referred to in Section 20 of Act No. 436, supra, and expressly repealed thereby, has never gone into operation.

Your attention is called to Section 17 of Act No. 40, which is as follows:

> "This act shall take effect on the first Monday after the second Tuesday in January, 1941."

Therefore, since Act No. 436, supra, was approved on September 13, 1939, Act No. 40, supra, was repealed prior to the effective date thereof, and such act was never put into force and effect in Wilcox County. In other words, no Board of Revenue was ever established under the provisions of Act No. 40, supra, and the old Court of County Commissioners, as created by the pertinent provisions of the Code of 1923, was not abolished by Act No. 40, supra.

It therefore follows that since Section 20 of Act No. 436, supra, did not abolish the Court of County Commissioners of Wilcox County as the same existed on the 13th day of September, 1939, as this section only purports to repeal Act No. 40, supra, your county did have a governing body as of that date.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 27, 1941.

Hon. Clyde E. Leach, Chairman,
Board of Registrars, Etowah County,
Gadsden, Alabama.

Elections — Citizenship — Registration —

A person who has been convicted of a felony in the federal courts, but has subsequently had his civil and political rights restored by the State Board of Pardons and Paroles, is entitled to be registered as an elector, provided he is otherwise qualified, even though he has not received a presidential pardon.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 7, 1941, in which you request my opinion as follows:

"I am chairman of the Etowah County Board of Registrars and as such we pass upon the legal qualifications and moral qualifications for those applying to be registered for voting etc. As such officer I am kindly asking you for the following legal opinion which I trust you will get to me at your earliest convenience.

"A was convicted in the Federal court for a felony and sentenced to prison for a year. After serving a part of the time he was discharged from custody and came home. He was discharged for more than two years when he applied to the State Board of Pardons and Paroles there at Montgomery for a restoration of civil and political right. After the State Board of Pardons and Paroles investigated his application and found that A was living an exemplary life he was given a certificate restoring his civil and political right and the SEAL of the State was attached thereto. A then applied to us and requested that he be placed upon the list of qualified voters of this County. He has shown good character and good living etc. What is our duty? Should we register him? His offense being a Federal one, did the State Board of Pardons and Paroles have the right to restore his civil and Political rights after he had been discharged from custody for more than two years. A has not received a presidential pardon.

"Will you let me have your legal opinion at your earliest convenience? Will you point out your authority."

Code of Alabama, 1940, Title 17, Section 15, sets out the classes of persons who shall be disqualified both from registering and voting, and includes those persons who have been convicted of a felony. Its forerunner was Section 364 of the Code of Alabama, 1923. Whether the conviction was had in a state or federal court is immaterial. See opinion to Hon. J. M. Schnell,

Chairman, Mobile County Board of Registrars, Mobile, Alabama (Quarterly Reports of Attorney General, Volume XVII, page 197).

Code of Alabama, 1940, Title 17, Section 16, provides how the citizenship and right to vote of such a person may be restored, and reads as follows:

> "§ 16. Pardon restores citizenship and right to vote. — Any person who is disqualified from voting by reason of conviction of any of the offenses mentioned in section 15 of this title, except treason and impeachment, **whether the conviction was had in a state or federal court,** and who has been pardoned, may be restored to his or her citizenship with right to vote by the state board of pardons and paroles when specifically expressed in the pardon." (Emphasis supplied)

From the emphasized portion it can be seen that it makes no difference whether the conviction was had in a state or federal court. The forerunner of this section was Section 365 of the Code of Alabama, 1923. It provided for restoration of citizenship with the right to vote by the Governor, approved by the Board of Pardons, instead of by the State Board of Pardons and Paroles, as is provided in Section 16, supra. However, that was prior to the time Section 124 of the Constitution of Alabama, 1901, was amended to invest the legislature with the power to provide for and regulate the administration of pardons and paroles. This section of the constitution was amended by the amendment proposed by Act No. 8, S. 4, passed on March 29, 1939, (General Acts, Special Session, 1939, page 8), which amendment was proclaimed ratified on July 21, 1939. Pursuant to the authority vested in it by this amendment, the Legislature, by Act No. 275, S. 186, approved August 25, 1939 (General Acts, 1939, page 426), created the State Board of Pardons and Paroles and invested the Board with the authority and power to grant pardons, with such pardons to relieve from civil and political disabilities only when specifically expressed in the pardon. See Section 16 thereof. Since the adoption of the act creating the State Board of Pardons and Paroles, that body has been invested with the power to grant pardons, and to restore the civil and political rights of persons convicted of any of the offenses enumerated in Section 15, supra. See opinion to Mrs. Edwina Mitchell, Associate Member, State Board of Pardons and Paroles, Montgomery, Alabama, under date of October 21, 1940 (Quarterly Report of Attorney General, Volume XXI, page 68).

This office has held on several occasions that a person who was disqualified from registering and voting by reason of conviction of any of the offenses enumerated in Section 364, supra, who had had his civil and political rights restored in the manner provided by Section 365, supra, was entitled to register as an elector, provided he was otherwise qualified. See opinions to Hon. E. K. Garrett, Board of Registrars, Russell County, Girard Alabama, under date of February 19, 1932 (Biennial Report of Attorney General, 1930-32, page 712); to Hon. Arthur H. Berg, Chairman, Board of Registrars, Mobile County, Mobile, Alabama, under date of March 4, 1932 (Biennial Report of Attorney General, 1930-32, page 742); to Mrs. Jessie W. Nunnelee, Chairman, Board of Registrars, Montgomery County, Montgomery, Alabama, under date of January 14, 1936 (Quarterly Report of Attorney General, Volume II, page 45); to Hon. Sam W. Hawkins, Chairman, Board of Registrars, Jefferson County, Birmingham, Alabama, under date of March 3, 1936 (Quarterly Report of Attorney General, Volume II, page 252); and to Hon. S. J. Gray, Board of Registrars,

Mobile County, Mobile, Alabama, under date of February 23, 1937 (Quarterly Report of Attorney General, Volume VI, page 84).

It has also been held by this office that it is not necessary for a person who has been convicted in the federal courts, and who has had his civil and political rights restored in the manner provided by Section 365, supra, to receive a presidential pardon to be entitled to register as an elector. See opinion to Hon. Arthur H. Berg, supra.

These holdings are equally true as to a person who has been convicted in the federal courts of any of the offenses enumerated in Section 364(15), supra, who has had his civil and political rights restored by the State Board of Pardons and Paroles since its creation by Act No. 275, supra.

The premises considered, you are advised that a person who was convicted of a felony in the federal courts, and who has subsequently had his civil and political rights restored by the State Board of Pardons and Paroles, is entitled to be registered as an elector, provided he is otherwise qualified, even though he has not received a presidential pardon.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 27, 1941.

Hon. James C. Long,
Road Supervisor, Cherokee County,
Centre, Alabama.

Road Supervisor — Cherokee County —

Has no authority to use or permit to be used the road equipment of the county for any purpose other than the construction, maintenance or repair of public roads and public bridges of the county.

Opinion by Assistant Attorney General Callahan.

Dear Sir:

Your request for official opinion, under date of June 21, 1941, is as follows:

"Under the provisions of House Bill No. 296, approved August 24, 1939, Section 8, the Road Supervisor is made Custodian of all machinery, equipment, supplies and material owned by Cherokee County. On November 7, 1939, I was appointed County Road Supervisor by Governor Dixon and I am, therefore, Custodian of equipment, etc.

"As Custodian of equipment I am frequently requested to perform work with County owned equipment for other County Departments at the expense of the County Road Department.

"All of the revenue that the County Road Department receives for construction of roads and bridges and maintaining same is derived from the gasoline tax and it is my interpretation of the law that all of our revenue **must** be spent on the construction and maintenance of County roads and bridges.

"It is my understanding that where County roads connect with streets leading into an incorporated town that I have authority to maintain such streets in order to have egress and ingress into such towns.

"If I have available equipment that is not needed on County road work I would like to know if I have authority to permit the use of such equipment on work for other County Departments and make a nominal charge for same, that is, a sufficient charge to cover labor, gasoline, oil, depreciation, etc.

"Please advise me in regard to the above matters at your earliest convenience."

As I understand your inquiry, you seek an opinion from this office as to whether or not you can permit county road equipment in your custody to be used in work not connected with county road or bridge building or maintenance or repair thereof when such equipment is not needed in road work.

Your authority must be found in Act No. 251, H. 296, approved August 24, 1939, page 143). This act made you custodian of the county road equipment and material for one purpose and that was to construct, maintain and repair the public roads and bridges of the County of Cherokee. The language of the act shows very clearly that you had possession of the equipment for this sole purpose. Under the law, the equipment and materials are the property of the County Board of Revenue and under its general supervision and control. This clearly appears from the above Act No. 250, H. 295, which became a law under Section 125 of the Constitution (Local Acts, 1939, page 138). Code of Alabama, 1940, Title 12, Section 177; **Corning v. Patton,** 236 Ala. 354, 182 So. 39; **Thompson v. Chilton County,** 236 Ala. 142, 181 So. 701.

Your question must not be confused with the legal question as to whether or not the governing body of Cherokee County had the power to so use or direct the use of the road equipment. That presents quite another question and does not fall within the scope of your question.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 27, 1941.

Hon. Charles Edgar Young,
Ex-Officio Clerk,
Law & Equity Court,
Lauderdale County,
Florence, Alabama.

Trial Tax — Lauderdale County Law and Equity Court —

1. $3.00 trial fee imposed under Local Acts, 1931, page 72, in the Law and Equity Court of Lauderdale County held to be a tax.

2. Governmental instrumentalities held exempt from payment of trial fee in Lauderdale County Law and Equity Court.

Opinion by Assistant Attorney General Small.

Dear Sir:

I have your letter of May 1, 1941, in which you request my official opinion as follows:

"I would like to have your opinion on the following:

"If Home Owners Loan, a Corporation, or any other governmental agencies, are exempt from trial tax in the Law and Equity Court of Lauderdale County, Alabama, as in the Circuit Court of Lauderdale County, Alabama."

Your question assumes that authority exists for the imposition of a trial tax upon cases generally which go upon the docket, or are tried in the Law and Equity Court of Lauderdale County.

House Bill No. 514 was passed over the Governor's veto on May 29, 1931 (Local Acts, 1931, page 72), and provides for the establishment of the Law and Equity Court of Lauderdale County.

Trial tax is imposed by authority of Section 9 of Act No. 194, H. 324, approved July 10, 1935 (General Acts, 1935, page 263), which provides in part as follows:

"§9. A trial tax of three dollars ($3.00) be, and the same is hereby imposed in each case, civil, criminal and equity, which is now pending and which hereafter goes upon the docket of any circuit court in this State, to be taxed and collected as other costs. *** "

You will note that the trial tax authorized supra, is imposed in all cases that go upon the docket of any **circuit** court in this State. If the said trial tax can, under any circumstances, be imposed in the Law and Equity Court of Lauderdale County, it must be authorized by the terms of the local act which created the said Court.

House Bill No. 514, passed over the Governor's veto on May 29, 1931 (Local Acts, 1931, page 72), provides in Section 6 as follows:

"§6. That the Judge of said Court shall receive a salary of Three Thousand Six Hundred Dollars per year, payable Three Hundred Dollars per month, out of the general fund of the County treasury at the end of each month, payable on warrants drawn by said judge, and that there shall be taxed as a trial fee the sum of $3.00 in all cases entered on the docket in said court. Said trial fee in all cases shall be paid by the clerk of said Court into the County treasury for the benefit of the general fund."

You will note that a trial fee of $3.00 in all cases entered on the docket in the Lauderdale County Law and Equity Court is, by the above quoted provisitions of law, properly assessed. It becomes necessary to determine whether the said $3.00 trial fee authorized by the above quoted Act is a part of the court costs in the said Lauderdale County Law and Equity Court or a revenue measure.

Trial tax in Alabama, imposed under the provisions of the revenue laws of this State, has been held by our Court of Appeals to be a tax and distinguishable from "Court Costs" as the latter term is generally applied.

In the case of **State v. Montevallo Coal Mining Company,** 197 So. 82, 87, Mr. Judge Rice, writing for the court, said:

"While, in the view we take, it would not be decisive, here, to hold that the 'trial taxes' involved were, indeed, additional 'Court Costs' — this for the reason that we see nothing to prevent the Legislature from adding, by a later enactment in positive terms, 'Court Costs,' as such, to those provided in Code 1928, § 7550 — yet, as a matter of fact (and law) it seems to us clear that the 'trial taxes' are not 'Court Costs' as that term is defined and understood in the law, but that they, although collected as 'Court Costs,' are, as they are stated to be, trial taxes.

"As written by Judge Cooley in his excellent work on Taxation (Cooley on Taxation, 4th Edition, Vol. 1, p. 109, Sec. 33): ' *** if the object of the fee is to provide general revenue rather than to compensate the officers, and the amount of the fee has no relation to the value of the services, the fee is a **tax**.' (Italics ours.) In other words, a charge fixed by statute for the service to be performed by an officer where the charge has no relation to the value of the services performed and where the amount collected eventually finds its way into the treasury of the branch of the government whose officer or officers collect the charge, is not a **fee** but a **tax**.' (Italics ours). And see Johnson v. State, 85 Tenn. 325, 1 Pickle, 325, 2 S. W. 802, and also State v. Davidson County, 96 Tenn. 178, 12 Pickle 178, 33 S. W. 924.

"So the imposition of the trial **taxes** here in question cannot properly be said to increase the 'Costs of the Proceedings,' as the term 'costs' is properly construed, under the provisions of Code 1928, § 7550."

Squaring Section 6 of the Local Acts of 1931, page 72, supra, with the rule laid down in the above case, we find a most decisive resultant comparison.

Section 6, supra, provides specifically that the three dollars trial fee shall be paid into the county treasury to the credit of the general fund of the county.

It is particularly worthy of note that the $3.00 trial fee here authorized is not assessed as a value placed upon the services of an officer of the court.

In the words of the learned Judge writing the opinion for the Court of Appeals of this State, in the above cited case of **State v. Montevallo Coal Mining Co.,** " 'if the object of the fee is to provide general revenue rather than to compensate the officers, and the amount of the fee has no relation to the value of the services, the fee is a tax.' "

In my judgment the fee set out in Section 6 of the Local Act of 1931, page 72, supra, exactly meets the meaning of the above statement of the Court. It must follow that the $3.00 trial fee here assessed is a tax and not "Court Costs" (Cf. Opinion of Attorney General, Quarterly Report, Volume XXI, page 58), and by the same token it must follow that those governmental instrumentalities which Congress has not permitted the State to tax in this regard are not liable for the payment of the $3.00 trial fee here considered. There is no such Congressional action concerning the Home Owners Loan Corporation. **Putnam v. Home Owners Loan Corporation,** 308 U. S. 21.

Cf. Opinions of the Attorney General reported in Quarterly Reports of Attorney General, Volume XIV, page 235;

Biennial Report of Attorney General, 1930-32, page 703;

Quarterly Report of Attorney General, Volume III, page 213;

Quarterly Report of Attorney General, Volume XII, page 11;

Biennial Report of Attorney General, 1934-36, page 711;

Biennial Report of Attorney General, 1936-38, page 690.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 28, 1941.

Hon. I. C. Heck,
State Comptroller,
CAPITOL.

Tax Sales — Redemption — Advertising Cost —

1. When real estate hats been redeemed from tax sales, and the cost of advertising has been remitted by the Probate Judge to the State Treasurer, such sum should be remitted by the State Treasurer to the newspaper which carried the notice of such tax sales.

2. Where real estate has been advertised for tax sale to "Owner Unknown", and the real estate bid in by the State, and final settlement has been made by the Comptroller with the Tax Collector, and such sale certified to the Land Commissioner, which sales were subsequently found to be void, the advertising cost should be paid by the State.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for official opinion dated May 3, 1941, follows:

"I would like to have your official opinion with reference to property redeemed through the Judge of Probate and certification of redemption issued by him on property which had sold to the State assessed to 'Owner Unknown.'

"After this office has made final settlement with Tax Collectors in 1940 and certificates for sales of property assessed to 'Owner Unknown' had been delivered by this office to the State Land Commissioner, there was an opinion rendered by the Attorney General that the Tax Assessor was not authorized to assess property to 'Owner Unknown' where the records in the office of the Judge of Probate disclose a record title owner of such property, and that such sales are void.

"Your opinion held that the Comptroller is without authority to set aside such sales after he has made final settlement with the Tax Collector and delivered the certificates of sale to the State Land Commissioner, and that the only recourse to have such sales set aside are being void for want of regularity is by proper court procedure or for the Governor to execute a quit claim deed, as provided by Section 6851 of the Code of 1923.

"We refer you to Quarterly Reports of the Attorney General. Volumes 20 and 21, pages 177 and 113, respectively.

"Payment to the publisher for advertising such sales in 1940, assessed to 'Owner Unknown,' was refused by the Comptroller on account of the ruling that such sales are void.

"Some sixteen pieces of property in one county which sold to the state for taxes in 1940, assessed to Owner Unknown, have been redeemed through the office of the Judge of Probate and certificates of redemption were issued by the Judge of Probate and the amount collected for state taxes and advertising costs remitted to the State Treasurer.

"What disposition shall be made of these advertising costs received by the State Treasurer?

"Would the State Comptroller have authority for paying the publisher for advertising the sale of such property assessed to 'Owner Unknown' either before any of this property has been redeemed or after the property has been redeemed?

"We now have on hand $18.62 remitted to the State Treasurer by a Judge of Probate, which covers advertising costs collected on sixteen pieces of property redeemed in a certain county. In case you rule the Comptroller has no authority for paying the publisher for advertising property assessed to Owner Unknown, where the records in the office of the Judge of Probate disclose a record title owner of such property, what disposition shall be made of this $18.62 now in the State Treasury, or any future collections of this nature which are turned in to the State Treasury?"

It appears from your request that some sixteen pieces of property mentioned therein which was bid in by the State at tax sale for the tax year 1940, have been redeemed through the office of the Probate Judge; included in the amount of redemption being the advertising cost for these tax sales, and you further state that these advertising costs have been remitted by the Probate Judge to the State Treasurer. Regardless of whether or not these sales are void, this money should properly be remitted by the State Treasurer to the newspaper which carried the notice of these tax sales.

My answer to the first part of your second inquiry is in the affirmative.

In this connection, I call your attention to Sections 232 and 233 of the Revenue Act of 1935 (Code of 1940, Title 51, Sections 267 and 268) which read respectively as follows:

"§232. For the real estate bid off for the State in each case the Judge of Probate shall make out a certificate of purchase to the State of like import to the one provided for in the preceding section, and deliver the same to the Tax Collector who shall, on final settlement, deliver all certificates received by him from the Judge of Probate to the State Comptroller, who shall examine carefully all certificates of purchase of real estate where the same were bid in for the State at tax sale. When the same are received by him, and if, in his opinion, such sale was erroneous for want of regularity, proper or sufficient description, error in advertising or for any other cause that may appear from such certificate, he shall so declare it and return the certificate to the Judge of Probate, and charge the account of the officer making the error with all taxes, interest, fees, and costs involved in said sale. The Comptroller shall notify the Judge of Probate who issued the certificate of such cancellation, and shall also notify the Tax Assessor of the County in which the property is situated, and direct him to assess the property as an escape for the years in which it was subject under existing laws. The Comptroller when he has settled the accounts of the Tax Collector shall deliver to the State Land Commissioner all certificates of land bid in for the State which have been accepted by him, and said Land Commissioner

shall cause the same to be recorded in a book kept in his office for that purpose and properly indexed for convenient reference. Lands bid for the State shall not thereafter be assessed except as herein provided until the same have been redeemed or sold by the State.

"§233. The cost of advertising the caption and conclusion of notices for the sale of real estate for the payment of taxes, and so much thereof as pertain to those portions of such real estate as are bid off for the State, must be paid by the State and the State Comptroller shall after such sale, and after the collector has filed with the State Comptroller the certificates of sale and purchases by the State as provided in the preceding section, audit the account of the owner or proprietor of the newspaper in which such notices were published, and shall draw his warrant on the State Treasurer in favor of such owner or proprietor for the amount he may find to be lawfully due him, and payable by the State and the Treasurer shall pay the same; but the State shall pay no other costs attending any tax sale."

It further appears from your request that final settlement has been made with the Tax Collector in regard to all of the property here considered, and you, as Comptroller, have certified these sales to the Land Commissioner. It will be noted from the provisions of Section 232 hereinabove quoted that, if such sale was erroneous for want of regularity, proper or sufficient description, error in advertising or for any other cause that may appear from such certificate, you may so declare it, and return the certificate to the Probate Judge, and charge the account of the officer making the error with all taxes, interest, fees, and costs in said sale. I am advised that when you made settlement with the Tax Collector of these pieces of property which were assessed "Owner Unknown," the error at that time did not appear, and these sales were certified to the State Land Commissioner as being regular in all respects. It would be practically impossible for the Comptroller to tell from the certificate of purchase sent to him by the various probate judges whether or not a sale of property assessed to "Owner Unknown" was regular in all respects. In fact, the only way in which the Comptroller could determine whether or not such sales were regular and valid would be in each individual case to check the records in the office of the Judge of Probate and the records in the office of the Tax Assessor and determine whether or not the statutes in regard to sale of such land for taxes had been strictly complied with. In my opinion, it was never the intention of the Legislature to place this burden upon the Comptroller.

It will be noted from the provisions of Section 233, supra, that where real estate has been bid in by the State at tax sales, the advertising cost must be paid by the State, and the State Comptroller shall, after every such sale, and after the collector has filed with the State Comptroller a certificate of sale and purchase by the State, audit the account of the owner or proprietor of the newspaper in which such notices were published, and shall draw his warrant on the State Treasurer in favor of such owner or proprietor for the amount he may find to be lawfully due him.

Therefore, since the property here considered was bid in by the State of Alabama, and the invalidity of the sale did not appear until after these sales had been certified by the Comptroller to the State Land Commissioner as pro-

vided in Section 232, it is my opinion that the advertising cost in this regard should be paid by the State and you should draw your warrant upon the State Treasurer in favor of the owner or proprietor of the newspaper publishing these notices in such sum or amount as may be lawfully due him.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 30, 1941.

Hon. B. P. Singleton,

Chief Examiner of Accounts,

Capitol.

Local Act No. 205, H. 536, approved November 4, 1932 (Local Acts, 1932, page 89), does not deprive the Probate Judge of Henry County of ex officio road fees as provided for in Section 29, Title 11, Code of 1940, provided the Probate Judge can make satisfactory proof to the Court of County Commissioners that he has performed duties in relation to public roads.

Opinion by the Attorney General.

Dear Sir:

Your letter of June 23, 1941, in which you request an official opinion, is as follows:

"Please refer to Local Acts of 1932, Extra Session, page 89, and to the Code of 1940, Title 11, Section 29, and advise me in answer to the following question.

"Is the Judge of Probate of Henry County entitled to receive the $400.00 ex-officio fees provided by Section 29 of Title 11, in connection with the discharging of duties in relation to the public roads, it being understood that his net annual compensation from his office does not exceed $5,000.00?"

The answer to your question depends on whether or not Act No. 205, H. 536, approved November 4, 1932 (Local Acts, 1932, page 89), was intended to place in the hands of the County Road Supervisor all of the duties in regard to roads and bridges which had formerly been imposed on other county officials. I have carefully examined said local act, and, in my opinion, it does not divest from the county governing body, of which the Probate Judge is a member, all of the duties which the law has imposed on it in relation to roads and bridges.

It is my opinion, therefore, that the Probate Judge of Henry County is entitled to not exceeding $400 for discharging his duties in relation to public roads, on proof to the County Commissioners that he has discharged such duties, and that his net annual compensation does not exceed $5,000.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 30, 1941.

Hon. Sam Morgan,
Superintendent of Education,
Crenshaw County,
Luverne, Alabama.

Schools — County Boards of Education — Claims —

Unfunded obligations of County Board of Education, outstanding on October 1, 1939, must be itemized and filed with the State Superintendent of Education not later than December 1, 1939, and approved by him, before payment can be made.

Opinion by Assistant Attorney General Screws.

Dear Sir:

Your letter of June 19, 1941, in which you request my official opinion, is as follows:

"I have a question that I would thank you for a ruling on. It is this:

"I have a principal who was employed in 1937 who began work July 1, 1937 and who signed a contract on October 1 the same year for period of twelve months or until September 30, 1938. July, August and September salaries were paid this principal's predecessor as had a contract for those three months. Now, the question is how can this man be paid for the three months for which he did not have a contract? He is leaving the County school system June 30, 1941. To make this just a little clearer — On July 1, 1939, the principals of our high schools were put on a twelve months' basis with contracts reading from July 1 to June 30. This was done with the permission of the principals and the County Board of Education.

"The three months for which these principals are claiming pay is the three months for which they did not have a contract but they were working those three months with a verbal agreement with Mr. Lowman, the Superintendent at that time that they could be paid for the three months but at the same time, the predecessors were paid for the three months.

"It is very apparent that if the Crenshaw County Board pays this obligation, it will have paid four men for doing two men's work for those three months.

"A few months ago, the State Examiners examined my books and I questioned them concerning this matter as to how we could dispose of it and they suggested I take it up with you. Dr. John and Dr. Collins are very familiar with this and I suggest that you call one of them or both, or, if necessary, I will be glad to come in and explain it to you."

In answer to your inquiry, I am of the opinion that the claim in question cannot be paid.

From the facts presented it appears that the claim is for three months' salary for the months of July, August and September of 1937. Assuming (but not deciding) that the claim is a legal obligation against the Board of Education of Crenshaw County, said claim cannot be paid due to Section 11 of Act No. 454, H. 642, approved September 21, 1939, (General Acts, 1939, p. 610), which provides as follows:

"Section 11. UNFUNDED DEBTS.—If any county or city board of education has outstanding on October 1, 1939, any unfunded or floating debts, an itemized statement of the same shall be filed by said board with the State Superintendent of Education not later than December 1, 1939. Upon the approval of the State Superintendent of Education said Board shall have the authority to pay said floating debts from any balance on hand at the close of any fiscal year provided that this authority shall expire on October 1, 1945."

You do not state in your letter of inquiry that the provisions of the foregoing section have been met, and, indeed, the records of the State Superintendent of Education reveal to the contrary. Therefore, the claim in question, an unfunded debt (assumed to be valid) outstanding on October 1, 1939, cannot now be paid, for Section 11 authorizes payment of only such unfunded debts which have been listed in the itemized statement filed by the County Board of Education with the State Superintendent of Education not later than December 1, 1939. Quarterly Report of Attorney General, Volume XIX, page 71; Quarterly Report of Attorney General, Volume XXII, pp. 84, 234.

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

June 30, 1941.

Hon. H. H. Kinney,
Judge of Probate,
Cullman County,
Cullman, Alabama.

Judges of Probate — Fees — Minors —

1. Where there are three minors involved, not having a general guardian, Judge of Probate has authority to accept the sum of not exceeding Two Hundred Dollars for each minor under Code of Alabama, 1940, Title 21, Section 99.

2. Judge of Probate held not entitled to make a charge for entering an order to pay funds of a minor, not having a general guardian, in his hands, to the parent of such minor or to such minor himself under Code of Alabama, 1940, Title 21, Section 101.

Opinion by Assistant Attorney General Garrett.

Dear Sir:

I have your letter of June 12, 1941, in which you request my opinion as follows:

"I would appreciate being advised if the Probate Judge is entitled to make a charge for entering the order authorized by Title 21, Section 101 of the 1940 Code.

"Does the Judge of Proabte have authority to accept, where there are three (3) minors involved, the sum not exceeding Two Hundred ($200.00) Dollars for each minor as provided by Title 21, Section 99 of the 1940 Code."

For convenience, your inquiries will be considered in inverse order.

Sections 99 and 101 of Title 21 of the Code of Alabama, 1940, are a part of Chapter 4 of said title, which is headed, "Judge of Probate as Guardian or Custodian of Funds." These sections read, respectively, as follows:

"§99. Debt owed minor, etc., may be discharged by paying into probate court.—The funds of a minor or person of unsound mind, not having a general guardian, not exceeding in amount two hundred dollars, may be paid to the judge of probate of the county in which said minor or person of unsound mind resides, if a resident of the state, or if a nonresident, to the judge of probate or like officer of the county in which the debtor or creditor resides; and the person from whom said sum is due may discharge himself by making such payment."

"§101. Duty and authority of judge.—The judge of probate shall expend such money in the maintenance and support of the minor or person of unsound mind or his wife or minor children, but should it be made to

appear to said judge that it is to the interest of the minor that said money be paid to the father or mother of said minor and that such parent is an honest and suitable person to disburse said fund for said minor, or if such minor is over the age of eighteen years, or is a married woman and it appears to said judge that it is to the interest of said minor that such payment be made to him or her, the judge may make an order and pay the same to such parent or such minor."

The forerunner of Section 99, supra, in the Code of Alabama of 1907 was Section 4478 thereof, which was construed by the Supreme Court of Alabama in the case of **Roberts v. Hunt,** 212 Ala. 475, 103 So. 451. In that case, the facts were as follows:

"The record discloses that on September 18, 1916, W. B. Stewart, as administrator of the estate of A. A. Hunt, deceased, paid to John F. Kelton, judge of probate, $355.07, and took his receipt for same as 'the amount of Paul and Leonard Hunt's distributive share in the A. A. Hunt estate.' On the same day the administrator filed his sworn account and statement for an annual settlement of the estate. This account showed a distribution of funds as of that date, including $177.52, paid to the judge of probate as the distributive share of Paul and Leonard Hunt, respectively, as minor heirs or legatees. This account was indorsed filed and set for hearing October 9, 1916; also indorsed, 'Audited, stated, decree thereon rendered, and ordered recorded, Oct. 9, 1916,' signed, 'Jno. F. Kelton, Judge of Probate.'"

One of the questions raised was whether or not the Judge of Probate had the authority to receive these funds in his official capacity so as to bind the surety upon his official bond, and the court held that the funds were such as the Judge of Probate was authorized to receive.

As a result of changes subsequently made by amendment and codification, Section 99, supra, is considerably different from Section 4478, supra, but in respect to the limitation in amount of Two Hundred Dollars, they are the same. Therefore, the case of **Roberts v. Hunt,** supra, is direct authority for holding that where there are three minors involved, not having a general guardian, the Judge of Probate has the authority to accept a sum not exceeding Two Hundred Dollars for each minor under Section 99, supra. See also **Roberts v. Hunt,** 212 Ala. 477, 103 So. 452. Cf. Opinion of the Attorney General to Hon. C. H. Howard, Judge of Probate, Elmore County, Wetumpka, Alabama, under date of April 12, 1935, Biennial Report of Attorney General, 1934-1936, page 140.

It is further my opinion that the Judge of Probate is not entitled to make a charge for entering the order authorized by Section 101, supra, for the payment of funds of a minor, not having a general guardian, in his hands, over to the parent of such minor or to such minor himself. It seems that the only compensation provided for the Judge of Probate for the performance of the duties placed upon him by this chapter is the commission of one and one-half per cent which he is allowed by Code of Alabama, 1940, Title 21, Section 102, for receiving and paying out such money. Cf. Opinion of the Attorney General to Hon. Matt Boykin, Judge of Probate, Mobile County, Mobile, Alabama, under date of December 19, 1939, Quarterly Report of Attorney General, Vol. XVII, page 391.

Code of Alabama, 1940, Title 11, Section 29, which sets out generally the fees to which the Judge of Probate is entitled, has been carefully examined, and no authority is contained therein for making any charge whatsoever for entering this order.

Code of Alabama, 1940, Title 11, Section 1, provides in pertinent part as follows:

> "§1. No fee charged unless expressly authorized.—The law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law."

This holding is also in accord with the purpose of this chapter as found by the Supreme Court in the case of **Roberts v. Hunt,** supra, wherein the court, in speaking of Section 4477 of the Code of Alabama, 1907, the forerunner of Code of Alabama, 1940, Title 21, Section 98, the first section of this chapter, said:

> "Section 4477 declares the judge of probate shall not act as guardian, but by virtue of his office he is made a quasi guardian of these funds to a limited amount. One purpose is to avoid the expense of a general guardianship over small estates of the kind."

Yours very truly,

THOMAS S. LAWSON,

Attorney General.

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